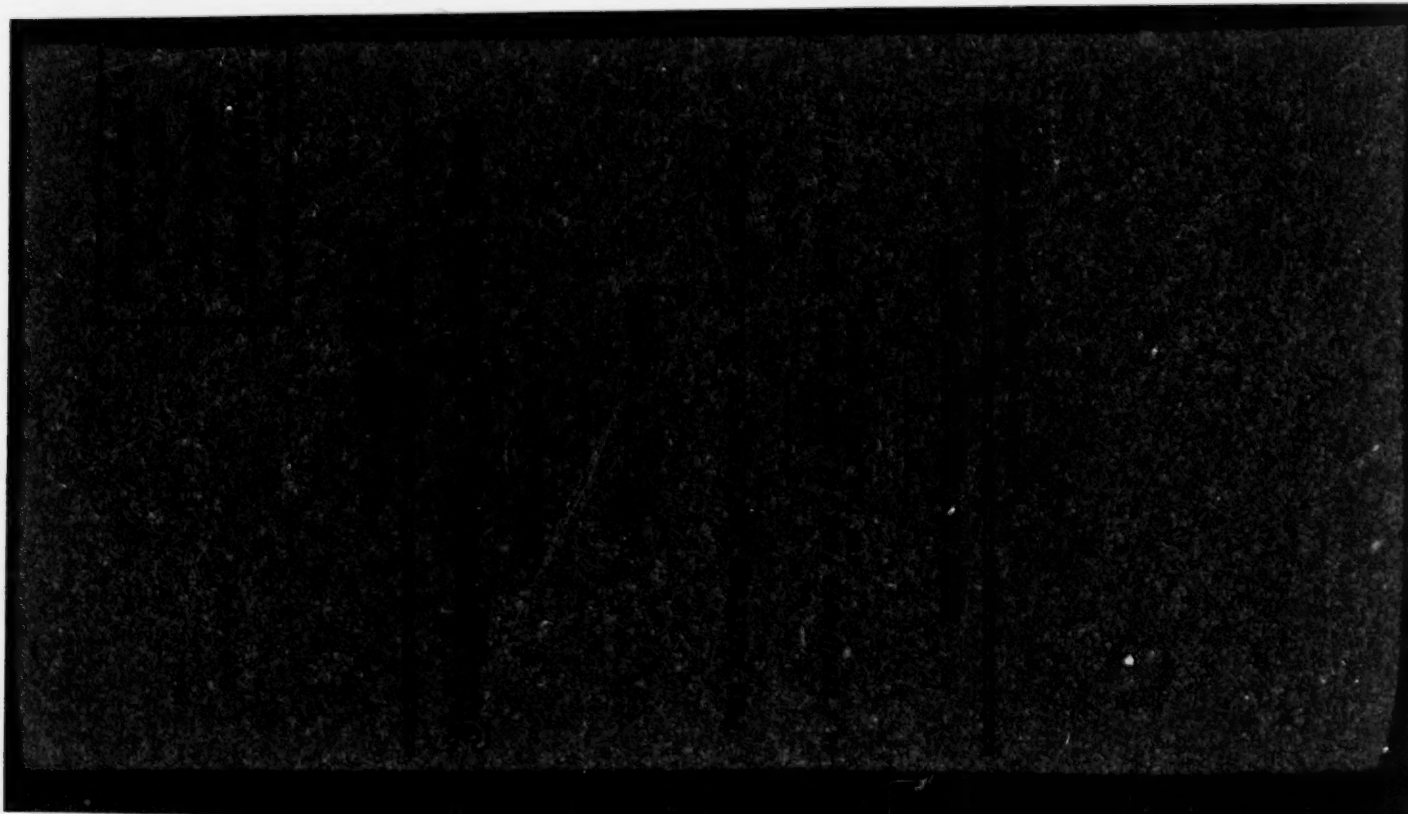

# INDEX.



ARGUMENT.



21493—13——1

CITATIONS.

# In the Supreme Court of the United States.

OCTOBER TERM, 1913.

THE UNITED STATES
*v.*
THE MIDWEST OIL COMPANY ET AL., Appellees. | No. 750.

*ON A CERTIFICATE FROM THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT*

**STATEMENT.**

This case was originally heard, in the District Court for the District of Wyoming, upon defendants' motion to dismiss the Government's bill. That court sustained the motion and entered a final decree accordingly. Upon appeal, the Circuit Court of Appeals for the Eighth Circuit certified certain questions of law to this court. This court has since called up the whole record, and the cause is now here in its entirety for final determination.

The object of the bill is to enjoin the defendants from trespassing upon a certain tract of public

petroleum land in the State of Wyoming and to obtain an accounting for petroleum wrongfully extracted therefrom. After averring ownership by the United States, and the fact that the land is chiefly valuable for petroleum, the bill alleges that on September 27, 1909, the particular tract in controversy, in common with many others of like character, was withdrawn from mineral exploration and from all forms of location, settlement, selection, filing, entry, or disposal, under the mineral or nonmineral public-land laws, by an order promulgated on that date by the Secretary of the Interior pursuant to the direction of the President. A copy of this order (omitting the descriptions of other lands) is attached to the bill and is incorporated into the pleading by reference. (R., 2, 8.) We reproduce it in the appendix of this brief, page 107. The order lists townships and sections aggregating more than 3,000,000 acres, situate in Wyoming and California, and purports to withdraw all of the public lands contained within those descriptions. Omitting the list, it reads:

TEMPORARY PETROLEUM WITHDRAWAL NO. 5.

> In aid of proposed legislation affecting the use and disposition of the petroleum deposits on the public domain, all public lands in the accompanying lists are hereby temporarily withdrawn from all forms of location, settlement, selection, filing, entry, or disposal under the mineral or nonmineral

> public-land laws. All locations or claims existing and valid on this date may proceed to entry in the usual manner after field investigation and examination.

It will be observed that the purpose of the withdrawal, as declared in the order itself, was to aid proposed legislation affecting (1) the *use* and (2) the *disposition* of the deposits of petroleum in public lands. The bill does not undertake to explain the details of the proposed legislation or the nature of the use or the disposition in view. This subject is elucidated by various public documents, including messages of the President, which were used by both sides at the argument and will be referred to more particularly below. Some of them are included in the record. (R., 19, 20.) Suffice now to say that they show the President was actuated first by the necessity of conserving a supply of fuel oil for the future use of the Navy, and second by a desire to effectuate an executive policy and a growing movement in Congress (evidenced, in part, by pending bills) to do away with the waste and other abuses existing under the petroleum placer law, and to substitute some other and wiser way of disposing of petroleum deposits to private interests.

At the time when this reservation was made there was no statute which gave expressly the authority to make it. Such a statute was afterwards enacted and approved June 25, 1910. (Appendix p. 126.) It authorizes withdrawals " for water-power sites,

irrigation, classification of lands, or other public purposes"; declares that lands so withdrawn shall remain open under the mining laws "so far as the same apply to minerals other than coal, oil, gas, and phosphates," and provides:

> That the rights of any person who, at the date of any order of withdrawal heretofore or hereafter made, is a bona fide occupant or claimant of oil or gas bearing lands, and who, at such date, is in diligent prosecution of work leading to discovery of oil or gas, shall not be affected or impaired by such order, so long as such occupant or claimant shall continue in diligent prosecution of said work: *And provided further,* That this Act shall not be construed as a recognition, abridgment, or enlargement of any asserted rights or claims initiated upon any oil or gas bearing lands after any withdrawal of such lands made prior to the passage of this Act.

The Senate committee which reported this bill construed it as a *limitation* upon the existing power of the President. (See report and proceedings in the Appendix, *infra,* p. 128.)

On July 2, 1910, the President approved a second order (set up by the bill, R., 3, 9) which in terms ratified and confirmed the first order and continued it in full force and effect. Neither of the two orders has been revoked or modified so far as the land in controversy is concerned.

According to the allegations of the bill, the land was free from any possession or claim, by the de-

fendants or others, not only at the date of the first withdrawal but continuously thereafter until March 27, 1910. On that date, it is charged, certain persons, called the original claimants, entered upon it without license or authority from the plaintiff and began to explore it for petroleum. The bill further charges that the exploration continued until May 5, 1910; that a discovery of petroleum resulted on that date; that on May 4, 1910, a location certificate, evidencing a claim to the land as a petroleum placer under the Federal mining laws, was filed in the county records of Natrona County, Wyoming, by the original claimants; and that the defendants, claiming through mesne conveyances under this pretended location, have extracted large quantities of oil and threaten to continue to do so. The prayer is for an injunction, an accounting, and the quieting of the plaintiff's title.

Without making any objection to the form or statement of the bill, the defendants moved to dismiss it on the merits, specifying as the grounds of the motion that the bill showed upon its face, first, that the plaintiff was not entitled to the relief prayed, second, that the order of September 27, 1909, was unauthorized and void, and, third, that the defendants were claiming under a valid location made under the mining laws before the date of the second order, July 2, 1910, and protected by the express terms of the act of June 25, 1910, *supra*.

The general mining law allows exploration, location, and purchase of lands of the public domain

which contain valuable mineral deposits. (R. S., sec. 2318 et seq.) The act of February 11, 1897 (29 Stat., 526), provides:

> That any person authorized to enter lands under the mining laws of the United States may enter and obtain patent to lands containing petroleum or other mineral oils, and chiefly valuable therefor, under the provisions of the laws relating to placer mineral claims.

In a brief written opinion (R., 25), stating merely the issue and the conclusion, the District Court upheld the position of the defendants. The effect is to treat the President's first order as a bit of waste paper. As the defendants and their predecessors were strangers to the land in controversy until months after that order was promulgated, the bald question presented is whether the President's act was absolutely void. If it was valid for any purpose it was effective to reserve the land from subsequent occupation and location.

*Purposes of the reservation.*

In our argument we will assume that the executive department, even by the personal act of the President himself, may not arbitrarily and capriciously withhold public lands from the operation of the public-land laws. At the same time we take it for granted that a reservation by the President will be upheld, if it may be upheld upon any possible hypothesis, and that it is not the duty of the Gov-

ernment when assailing trespassers to allege and prove the underlying purposes of the reservation. In this case, however, the reasons for the action are clearly revealed. In his message of December 6, 1910 (Appendix, p. 116), the President, referring to this and other oil-land withdrawals, said:

> In September, 1909, I directed that all public oil lands, whether then withdrawn or not, should be withheld from disposition pending congressional action, for the reason that the existing placer-mining law, although made applicable to deposits of this character, is not suitable to such lands, and for the further reason that it seemed desirable to reserve certain fuel-oil deposits for the use of the American Navy.

Again:

> The principal underlying feature of such legislation should be the exercise of beneficial control rather than the collection of revenue. As not only the largest owner of oil lands, but as a prospective large consumer of oil by reason of the increasing use of fuel oil by the Navy, the Federal Government is directly concerned, both in encouraging rational development and at the same time insuring the longest possible life to the oil supply.

The importance of oil as a naval fuel, in increasing the speed and steaming radius of ships and enhancing their efficiency in other ways, has now be-

come a matter of notoriety and common knowledge. In 1908 the General Board of the Navy recommended that oil be used as an auxiliary in the large ships and as the sole fuel of all destroyers and smaller vessels (Appendix, p. 120). In a letter to the Secretary of the Interior, of June 25, 1912 (*ib.*, p. 121), the Acting Secretary of the Navy stated that the use of oil is necessary to maintain the superiority of our vessels over the vessels of other powers, but that the definite adoption of oil burning must be preceded by the assurance of an adequate oil supply, since, with our vessels fitted only to this fuel, "a failure of the supply might constitute a national calamity."

February 24, 1908, the Director of the Geological Survey, by a letter of that date (Appendix, p. 108), called the attention of the Secretary of the Interior to the importance of conserving oil in the public lands for the use of the Navy, and recommended that the filing of claims upon oil lands (mentioning specifically those in the State of California) be suspended, "in order that the Government may continue ownership of valuable supplies of liquid fuel in this region where all fuel is expensive." He affirmed that the areas in which the probabilities of finding large deposits were greatest had already been prospected, and that the areas of probable oil territory then remaining under Government control were rapidly being filed on and patented, either lawfully or fraudulently. He emphasized

the necessity of prompt action upon the part of the Government, saying:

> The present rate at which the oil lands in California are being patented by private parties will make it impossible for the people of the United States to continue ownership of oil lands there more than a few months. After that the Government will be obliged to repurchase the very oil that it has practically given away.

In a letter to Secretary Ballinger of September 17, 1909 (Appendix, p. 110), the director showed that the production of petroleum had come to exceed the legitimate demand; that the disposal of public petroleum lands at nominal prices encouraged overproduction; and that the practice of drilling wells close to boundary lines of private holdings demanded a change in the law, that disposition by the Government might be in barrels of oil rather than acres of land. The object of this letter was to support and renew the previous recommendation that oil lands be reserved for naval use. Secretary Ballinger thereupon wrote to the President September 17, 1909 (Appendix, p. 112), bringing to his attention "the subject of the conservation of the petroleum resources of the public domain, *with special reference to the present and future requirements of the American Navy.*" He mentioned also the overproduction encouraged by the law as it then stood, and the losses to the public resulting from the

method of drilling wells close to private boundaries, and concluded:

> The time appears opportune for legislative action that will assure the conservation of an adequate supply of petroleum for the Government's own needs. *This legislation should give authority to fix the terms of disposition of* public oil lands *so as to provide for the future demands of the Navy* and should *also authorize the permanent reservation of such areas as the Executive, after full investigation, may find necessary for this Federal purpose.* It is believed that such legislation would not interfere with the profitable development and utilization of the California oil pools.
>
> In aid of such legislation, and, indeed, as *essential* to the accomplishment of its purpose, all the lands hereinbefore mentioned should be temporarily withdrawn from all forms of filing, entry, and disposal, including mineral entry.

Soon afterwards the withdrawal now in controversy was directed by the President. The above-mentioned letters appear in the printed report of the hearings held by the House Committee on Public Lands May 13 and 17, 1910, on House bill No. 24070, from which the act of June 25, 1910, *supra,* was derived.

From this history, read with the extracts we have given from the President's message, it is evident that the immediate purpose of the order was to conserve a supply of fuel for the Navy. We state

this as an unquestionable proposition of fact. It is evident, too, that in the absence of prompt action the purpose would or might have been defeated. There was an emergency; there was no time to wait for the action of Congress.

Correlated with this purpose was the more general object of conserving one of the most important, but limited, resources of the public domain for the benefit of the whole people, with a view to future disposition in such wise and economic ways as would provide adequate public control, insurance against waste and monopoly, and some public revenue, on the one hand, and proper protection to the private operation on the other. It can not be doubted that the conditions which had grown up under the petroleum placer law, especially in California, were productive of frauds, confusion in administration, and signal waste. And the losses, actual and threatened, affected not only the deposits in lands acquired by individuals and corporations, but also those in the lands retained by the Government. See the President's messages of January 14 ,1910, and December 6, 1910. (Appendix, p. 116.) As we have said, there was a growing movement in Congress to remedy this condition. The bills on the subject which had been introduced in the Fifty-ninth and Sixtieth Congresses were quite numerous. This withdrawal was made during the interval between the first and second sessions of the Sixty-first Congress. We give in the Appendix (p. 123) a list including cer-

tain measures which were introduced at the first session and were pending when the withdrawal occurred, and others introduced at the second session, of which a number antedated the claim of the defendants. Of the former, Senate bill 438 and House bills 9771 and 9964 related only to oil lands in California. Senate bills 597 and 2623 related to all oil lands. The effect of these bills, if passed, would have been to repeal the old law and impose limitations and restrictions upon the interests that might be acquired in oil lands. Senate bill 597 was particularly comprehensive in this respect. Leaving out of account the numerous bills (introduced between January 5, 1910, and April 18, 1910) which expressly authorized the President to withdraw oil lands for public purposes, and which may justly be regarded as expressing a command or legislative policy as well as a mere permission, we find in this proposed legislation measures seriously devised for the conservation and economic use of coal, oil, asphalt, gas, and phosphate deposits of the United States. Their aim is to prevent fraud, monopoly, and waste. They require reasonable pecuniary returns to the United States, limit the interest which an individual or corporation may acquire, and provide for public supervision, leaving much to the discretion of the Secretary of the Interior. Some of the bills introduced in January were without doubt the bills which the President mentions in his message of January 14, 1910, as having been framed with his approval, and these

must have been in contemplation when the withdrawal was made. The whole subject was before Congress long before the defendants' claim accrued. It was widely discussed, of general notoriety, and was elaborated in the January message. And Congress, although it was unable to agree upon positive regulations for the future use and disposition of these mineral deposits, declared in favor of reserving them in the United States until it could determine upon some more definite course. No other construction can be put upon the act of June 25, 1910. Its necessary import is to approve the policy of reserving the oil and the other minerals specified and to approve the reservations previously made.

Although in the bills referred to there is no express mention of the naval use, this matter was fully protected by the provisions for Executive reservations, and by the wide discretion which the principal bills conceded to the Executive in the disposition of oil deposits.

In the light of the situation which existed when the first withdrawal was made, and subsequent developments, the language used in the order, " in aid of proposed legislation affecting the use and disposition," etc., needs no further explanation. There were two public purposes, first, to conserve oil for the naval use, partly by reserving specific lands and partly by public control over exploitation of the others, and, second, to assist Congress to do

away with acute public evils resulting from the existing laws of disposition.

*Analysis of defendants' argument.*

Defendants contend (1) that the power of Congress "to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States" (Art. IV, sec. 3) is not only paramount, but so absolutely exclusive that no authority can exist in the Executive respecting the public lands, even to use or appropriate them temporarily to meet great public necessities, unless it be deducible from some act of Congress; (2) that no authority to make a reservation like the one in question existed under the acts before the act of June 25, 1910; and (3) that even if such an authority might otherwise be conceded, its application to mineral lands is forbidden by the mining law. This last proposition seems to be particularly relied on. It assumes that the mining law, because it gives the right to explore for and purchase all mineral deposits and contains no express exceptions, necessarily imports an intention of Congress to dedicate all mineral lands to private acquisition and to forbid the reservation or use of any part of them for public purposes.

*Analysis of the Government's argument.*

Our argument naturally divides into three heads: 1. The first and (in view of the help afforded by

executive, legislative, and judicial construction) perhaps the simplest answer to the defendants' contention is that the authority of the President to reserve public lands for public purposes has long existed by the will and sanction of Congress.

This authority has been exercised repeatedly and increasingly since the early days of our national history. Congress, with full knowledge, has never disapproved of it, but, on the contrary, has manifested its approbation again and again by acts recognizing the practice as beneficent and lawful. Congress did not disapprove of the reservation now in question; it approved it by the act of June 25, 1910, *supra*. In numerous cases the authority has been considered by the courts and the Attorney General and always has been upheld.

2. The authority to reserve public lands temporarily to meet public necessities inheres in the President under the Constitution, subject, of course, to the paramount authority of Congress. Such a reservation is simply a tentative appropriation to a public purpose of public property which Congress has not appropriated to any other purpose. The act involves no intrusion, direct or indirect, upon the legislative prerogative, since it has no legislative quality and does not even tend to remove the subject matter from legislative control.

The public lands are national property, held "in trust for all the people" (*United States* v. *Trinidad*

*Co.*, 137 U. S., 160, 170; *United States* v. *Beebe*, 127 U. S., 338 342), and destined to be devoted to the national welfare, including, of course, the convenience of government, the national safety, and the common defense. When it becomes evident that a pressing need exists, or will exist, to use specific tracts for governmental purposes, a duty at once arises as pressing as the need to safeguard the lands required. This is not a duty created by any statute; its roots are in the Constitution itself and it springs up with the necessity. Congress, having been given plenary control of the public lands by the Constitution, is privileged to ignore the duty, if it sees fit; but this will not be presumed. Congress may appropriate the lands itself, or it may authorize the President or some one else to do so. When, however, the necessity has not been anticipated by legislation, so that Congress has not expressed its controlling will one way or the other concerning it, and when the recognition of its existence occurs at such a time and in such circumstances that it would be unwise and dangerous to defer action, the duty to set apart the required tracts (subject to the future disposal of Congress) devolves with all its weight upon the President. If this be not so, there is no one who can act; the Nation is impotent to protect itself, and its interests must be sacrificed. The President's functions under the Constitution are such as to point to him, and him alone, as the active

agent of the Government who can and must meet the emergency.

While these considerations apply with peculiar force to a reservation made in contemplation of a direct use by the Government, they avail also to uphold a reservation whose object is generally to avert the waste and destruction of an important national resource which threaten to result from a general land law operating in conditions not present or anticipated when the law was passed. This is especially true when the emergency leaves no time for legislative action and when remedial legislation is proposed or actually pending.

3. The proposition that the general language of the mining law precluded the reservation is not to be regarded as a serious element in the case. There is not a word in it to indicate an intention to interfere with this authority of the President which Congress had approved of and relied on for ~~nearly a century~~ many years when the first mining law was passed. Even if doubtful, the law could not be construed as designed to abolish a governmental authority so useful and so necessary. But there is not even an apparent repugnancy between the law and the authority, since the former, like all the general land laws, offers to its beneficiaries only those lands which are unappropriated when they seek to enjoy its bounty.

ARGUMENT.

## I.

**The authority of the President is sustained by the consent of Congress, presumed from uniform acquiescence in and repeated approvals of the executive practice of making reservations for public purposes.**

1. *The authority may be readily implied independently of user and express recognition by Congress.*

The general land laws are, in essence, mere offers of rights and privileges in the public lands upon stated conditions. As this court said, in *Butte City Water Co.* v. *Baker* (196 U. S., 119, 126):

> The Nation is an owner, and has made Congress the principal agent to dispose of its property. * * * While the disposition of these lands is provided for by congressional legislation, such legislation savors somewhat of mere rules prescribed by an owner of property for its disposal. It is not of a legislative character in the highest sense of the term * * *.

These offers are continuing general offers, and the subject matter offered is vast, unidentified, and unknown. No private owner in his right senses would make such an offer if he were not conscious of his ability to observe its operation and modify or retract it instantly where it threatened destruction to his own interests. It is not lightly, therefore, that a different intention may be imputed to the "principal agent" of the Government. For,

as this court has observed of the preemption right, which is in no sense inferior to the right to locate mines:

> We can not suppose that this bounty was designed to be extended at the sacrifice of public establishments or of great public interests. *Wilcox* v. *Jackson*, 13 Pet. 496, 514.

A power in the Executive to except specified tracts temporarily, when the disposition of them would result in grave public injury, is of national necessity. The power could be readily inferred even though it had never been exercised or recognized in congressional enactment. The assumption of its existence would be fully justified by the necessity, by the fact that Congress has made the Executive "the guardian of the people of the United States over the public lands" (*Knight* v. *Land Association*, 142 U. S., 161, 181), and by the fact that these general bounty laws are not evidence of an intention to part with the particular tracts reserved. The Executive has acted upon this assumption from an early day, and this court has declared its opinion that, independently of any statute, the power, "which has been exercised down to the present time," had existed "ever since the establishment of the Land Department." (*Wolcott* v. *Des Moines Co.*, 5 Wall., 681, 688.) But as most of the many authorities which have sustained this power of reservation (and we know of none that has not) invoke both user and legislative recognition, we will pursue the discussion upon that basis.

2. *Discussion of authorities sustaining the implied power.*

The following are the authorities bearing on our subject:

(*a*) Sustaining military reservations—

*Grisar* v. *McDowell,* 6 Wall., 363.

*Scott* v. *Carew,* 196 U. S., 100.

*Behrends* v. *Goldsteen,* 1 Alaska, 518, 524 (naval reserve).

17 Op., 160 (MacVeagh, July 15, 1881).

17 Op., 230 (MacVeagh, Oct. 21, 1881).

13 L. D., 426 (Shields, Assistant Attorney General, June 17, 1890).

29 L. D., 32 (Van Devanter, Assistant Attorney General, July 17, 1899).

(b) Sustaining Indian reservations—

*United States* v. *Leathers,* 6 Sawy., 17; Fed. Cas. No. 15581.

*United States* v. *Payne,* 8 Fed., 883.

*United States* v. *Sturgeon,* 6 Sawy., 29.

*United States* v. *Martin,* 14 Fed., 817, 821.

*McFadden* v. *Mountain View Min. & M. Co.* (C. C. A., 9th Cir.), 97 Fed., 670.

*Gibson* v. *Anderson* (C. C. A., 9th Cir.), 131 Fed., 39.

*United States* v. *Grand Rapids, &c., R. Co.,* 154 Fed., 131.

16 Op., 121 (Devens, Aug. 10, 1878).

17 Op., 258 (Brewster, Jan. 17, 1882).

19 Op., 370 (Miller, July 31, 1889).

See, also, *In re Wilson,* 140 U. S., 575. *Spalding* v. *Chandler,* 160 U. S., 394, 403. *Donnelly* v. *United States,* 228 U. S., 243; 708.

(*c*) Sustaining reservations made in aid of proposed legislation:

*Wolcott* v. *Des Moines Co.*, 5 Wall., 681.

*Riley* v. *Welles* (decided in 1870 but reported much later), 154 U. S., 578.

*Williams* v. *Baker*, 17 Wall., 144.

*Homestead Co.* v. *Valley Railroad*, ib., 153.

*Wolsey* v. *Chapman*, 101 U. S., 755.

*Litchfield* v. *Webster County*, ib., 773.

*Dubuque, etc., R. Co.* v. *Des Moines Valley R. Co.*, 109 U. S., 329.

*Bullard* v. *Des Moines, &c., R. Co.*, 122 U. S., 167.

*United States* v. *Des Moines Nav., &c., Co.*, 142 U. S., 510.

The above are the so-called Des Moines River cases. The withdrawal there in question was first made under an erroneous interpretation of a grant and afterwards held in force in the expectation that Congress would extend the grant so as to include the lands reserved.

*United States* v. *Grand Rapids, &c., R. Co.*, 154 Fed., 131.

(*a*) *Authorities relating particularly to military reservations.*

In *Grisar* v. *McDowell* (6 Wall., 363) the plaintiff, under a conveyance by the city of San Francisco, claimed title to certain lands which, prior to the conveyance, had been reserved by the Presi-

dent, *without statutory authority,* for a military reservation, but which at the time of the conveyance, and for a number of years thereafter (until plaintiff was ousted by the defendant, a military officer), had been actually improved, cultivated, and inhabited by the plaintiff and those through whom he claimed title from the city. The claim of the city, which stood back of this and other conveyances to individuals, was based upon its successorship to a pueblo, which had been entitled to a grant under the laws of Mexico. That claim had been confirmed by a decree of the Circuit Court of the United States for four square leagues, *including the premises in dispute,* subject to certain exceptions, among which were all such parcels of land as had been previously " reserved or dedicated to public uses *by the United States.*" The decree was made in May, 1865 (p. 377). It was confirmed by an act of Congress in 1866, " subject, however, to the reservations and exceptions designated in the decree " (p. 378). The President's reservation had been made in 1851. As the court held that the decree and the act measured the title of the city, and consequently that of the plaintiff, it became a very important question whether the withdrawal by the President was a reservation or dedication " by the United States." It was objected (see p. 380), first, that the lands in controversy were not public domain but the property of the city when the order of the President was made. This the court

disposed of by holding that all the lands included in the city's claim remained the property of the United States until, through the judicial proceedings and the act of Congress (all subsequent to the order), the lands which the city was to have were definitively set off and measured by the authority of the Government.

Secondly, it was objected (ib.) that, even if the lands in controversy did constitute a part of the public domain when the President acted, "they could only be reserved from sale and set apart for public purposes under the direct sanction of an act of Congress." Concerning this contention the court said (p. 381):

> But further than this: From an early period in the history of the Government it has been the practice of the President to order, from time to time, as the exigencies of the public service required, parcels of land belonging to the United States to be reserved from sale and set apart for public uses.
>
> The authority of the President in this respect *is recognized* in numerous acts of Congress. Thus, in the preemption act of May 29, 1830, it is provided that the right of preemption contemplated by the act shall not "extend to any land which is reserved from sale by act of Congress, or *by order of the President*, or which may have been appropriated for any purpose whatever." Again, in the preemption act of September 4, 1841,

"Lands included in any reservation by any treaty, law, *or proclamation of the President* of the United States, or reserved for salines or for other purposes," are exempted from entry under the act. So by the act of March 3, 1853, providing for the survey of the public lands in California, and extending the preemption system to them, it is declared that all public lands in that State shall be subject to preemption, and offered at public sale, with certain specific exceptions, and among others "of lands appropriated under the authority of this act, or *reserved by competent authority.*" The provisions in the acts of 1830 and 1841 show very clearly that by "competent authority" is meant the authority of the President and officers acting under his direction.

The action of the President in making the reservations in question was indirectly approved by the legislation of Congress in appropriating moneys for the construction of fortifications and other public works upon them. The reservations made at the same time embraced seven distinct tracts of land, and upon several of them extensive and costly fortifications and barracks and other public buildings have been erected.

The court also said (p. 380):

On the other hand, if the lands were at the time a part of the public domain, as they must be considered to be, because they have been excluded from the lands confirmed to the city in satisfaction of the claim, it is of

> no consequence to the plaintiff whether or not the President possessed sufficient authority to make the reservations in question. It is enough that the title had not passed to the plaintiff, but remained in the United States.

Because of this statement, it has been urged that the language first quoted was *obiter*. But this surely can not be correct, since the question whether the President's act was void or not was exceedingly germane to the inquiry whether the lands were in fact excluded from the confirmation. They were not, unless they were so far "reserved or dedicated to public purposes by the United States" as to fall within the exception, couched in those words, in the decree of confirmation.

Furthermore, the declarations concerning the President's implied authority were solemn and explicit; they have stood unquestioned for nearly 50 years; they have been cited and greatly relied on by the courts and the executive departments, if not by Congress, and it is too late now to question their authority.

It will be observed that the validity of the reservation was not made to depend upon the subsequent appropriation acts. They were cited merely as cumulative evidence of the congressiona' recognition. It will be noted also that the language quoted from the preemption acts was relied on not merely as conferring a power to withhold land from pre-

emption, but as recognizing a power, existing, to withhold it from any disposition. If the plaintiff had been claiming under a law, like the mining law, which contains no express exception, the result would have been the same. In fact, his claim was not based on any of the land laws.

In *Scott* v. *Carew* (196 U. S., 100) it was held that an act passed in 1826, which opened lands in Florida to preemption, could not be deemed to apply to lands which had been first occupied by troops and afterwards formally reserved by the President for military purposes. The court said (p. 114):

> It was until the post was abandoned an appropriation of the land for military purposes. Quite a number of reservations and posts in our Western territory once established have afterwards been abandoned, but while so appropriated they are excepted from the operation of the public land laws, and no right of an individual settler attaches to or hangs over the land to interfere with such action as the Government may thereafter see fit to take in respect to it. No cloud can be cast upon the title of the Government—nothing done by an individual to embarrass it in the future disposition of the land.

*Behrends* v. *Goldsteen* (1 Alaska, 518, 524), holds that land reserved for naval uses by the Secretary of the Navy is not subject to mining location.

In his opinion of July 15, 1881 (17 Op., 160), Attorney General MacVeagh, after stating that the power of the President to make reservations of public lands for public purposes is too well established to admit of doubt, and referring to *Frisbie* v. *Whitney* (9 Wall., 187), and the *Yosemite Valley Case* (15 Wall., 77), respecting the right of a preemption settler as against the Government, said (p. 163):

> It should be borne in mind that the power of the President here referred to is recognized by Congress (*Grisar* v. *McDowell, supra*). *Such recognition is equivalent to a grant.* Hence, in reserving and setting apart a particular piece of land for a special public use, the President must be regarded as acting by authority of Congress, and unless this authority is so restricted as not to extend to land covered by a preemption filing (and I am not aware of any restriction of that sort), I do not see why such land may not be as effectually reserved and set apart by the President thereunder as by the direct action of Congress. Land so covered, where payment and entry have not been made, is subject to appropriation or disposal by Congress simply because, although occupied with a view to preemption, the settler has not by virtue of his occupancy acquired any interest whatever therein as against the Government, and it still remains a part of the public domain, over the disposition of which Congress has full control. Upon the same ground (namely, the absence of any right in

> the settler to the land as against the Government, and the fact that it continues in the absolute ownership of the latter) such land would seem to be subject to reservation for public uses by the President when acting by authority of Congress.

Again, on October 21, 1881, the same Attorney General advised the Secretary of War (17 Op., 20,) that *mineral land* might be so reserved by the President for military or other public purposes. Reaffirming the opinion last cited, he said (p. 232):

> This power is in the above-mentioned opinion regarded as extending to any lands which belong to the public domain, and capable of being exercised with respect to such lands so long as they remain unappropriated. As thus defined the power is broad enough to include mineral lands belonging to the public domain, at least whilst they remain unaffected by any private right acquired under the laws relating thereto. I am satisfied with that view of the subject, and accordingly answer the first question in the affirmative. This necessarily involves a negative answer to the second question; since, after public lands have once been lawfully reserved by the President for public uses, the lands so appropriated become severed from the public domain, and are thenceforth not subject to occupation and purchase under the general law.

The authority has been declared in numerous decisions of the Land Department, among which reference may be made to *Catlin* v. *Northern Pa-*

*cific R. R.* (11 L. D., 511, 513); the opinion of Assistant Attorney General Shields, June 17, 1890 (13 L. D., 426); and the opinion of Assistant Attorney General Van Devanter of July 17, 1899 (29 L. D., 32, 33), in which he said:

> While there is no specific statutory authority empowering the President to reserve lands of the United States for military purposes, yet the right to direct the use of such lands for public purposes, including military, has been asserted by this department in numerous instances, and has been expressly recognized by the courts and inferentially by various acts of Congress.

After citing *Grisar* v. *McDowell* and certain opinions of the Attorneys General, he continued (p. 34):

> In his opinion of July 31, 1889 (19 Op. Att'y Gen., 370), Attorney General Miller, after discussing certain legislation which limited the quantity of land to be included in reservations for military purposes in the Territory of Oregon, said that the validity of the Executive order then under consideration rested not on the statute referred to but on a long-established and long-recognized power in the President to withhold from sale or settlement at discretion portions of the public domain, said:
>
> "This power Congress recognizes in the legislation above discussed, which does not grant any such power, but only seeks to restrict one already existing. When Congress

> creates an exception from a power, it necessarily affirms the existence of such power, and hence the well-known axiom that the exception proves the rule."
>
> There can be no doubt as to the general authority of the President to direct the use of such of the lands of the United States as may in his opinion be necessary therefor for military purposes.

In the first volume of the Land Decisions, page 703, in a discussion of this power, it is said:

> That the power resides in the Executive from an early period in the history of the country to make reservations has never been denied either legislatively or judicially, but on the contrary has been recognized. It constitutes in fact a part of the Land Office law, exists *ex necessitate rei*, as *indispensable to the public weal*, and in that light, by different laws enacted as herein indicated, has been referred to as an existing undisputed power too well settled ever to be disputed.

(*b*) *Authorities relating particularly to Indian reservations.*

*United States* v. *Leathers* (6 Sawy., 17) involved the question whether a reservation made by executive order on March 23, 1874, brought the land within the Indian liquor statute. Upon the authority of *Wolcott* v. *Des Moines Co.* and *Grisar* v. *McDowell*, the reservation was sustained. The court also referred to subsequent appropriation

acts, and to the broad statutory authority of the President in Indian affairs.

*United States* v. *Payne* (8 Fed., 883) was an action brought by the United States to recover a penalty for being in the Indian country contrary to law. The defendant pleaded, *inter alia*, that he had made a settlement on the land on which he was found under the preemption and homestead laws. The question then was whether the lands were "included in any reservation by any treaty, law, or proclamation of the President, for any purpose" (sec. 2258, R. S.). The court found that the land had been reserved by force of treaties with the Indians, but said (p. 888):

> Now, if the treaty-making power can convey title, it can reserve a part of the public domain for a specific purpose, because this is but the exercise of a less higher power than that which conveys title. So can the President of the United States, by an Executive order, reserve a part of the public domain for a specific lawful purpose. *Wolcott* v. *Des Moines Co.*, 5 Wall., 681; *Grisar* v. *McDowell*, 6 Wall., 363.

An important decision is that of *Gibson* v. *Anderson* (131 Fed., 39) by the Circuit Court of Appeals for the Ninth Circuit. It was there held that a reservation of public lands made by the President, without statutory authority, as an Indian reservation, operated *to withdraw the lands from the general mining law*, although the reservation

was made long after that law became effective. We quote from the opinion (p. 40):

> To show that there was equity in the bill, the appellant advances the proposition that the act of Congress embodied in section 2319 of the Revised Statutes (U. S. Comp. St. 1901, p. 1424), declaring all mineral deposits in the public lands of the United States open to exploration and purchase, and the lands containing the same to occupation and purchase, can not be repealed or suspended by a proclamation of the President. But there is no question here of repealing or suspending the operation of an act of Congress. The question is whether the President could, by proclamation, reserve a portion of the unoccupied public lands of the United States for an Indian reservation. In *McFadden* v. *Mountain View Mining & Milling Company* (97 Fed., 670, 38 C. C. A., 354) this court said:
>
> "There can be no doubt of the power of the President to reserve those lands of the United States for the use of the Indians. The effect of that Executive order was the same as would have been a treaty with the Indians for the same purpose, and was to exclude all intrusion upon the territory thus reserved by any and every person other than the Indians for whose benefit the reservation was made for mining as well as other purposes."
>
> The appellant seeks to distinguish that case from the case at bar by referring to the fact that the proclamation setting aside the

Colville Reservation, which was under consideration in that case, was made before the enactment of section 2319 of the Revised Statutes. But, if the President had the power to set aside a portion of the public domain for an Indian reservation, it is clear that the power was not abridged by the enactment of that statute. Congress did not thereby dispose of any estate in the public lands, or create any burden thereon, or establish any right therein until the actual inception and assertion of mining rights thereunder. Statutory license to locate mining claims has never been held, prior to the acquisition of a vested right, to be an obstacle to either the disposition or the reservation of the public lands. We entertain no doubt of the correctness of our ruling in the McFadden case. The power of the President to create a reservation of public lands for the use and benefit of the Indians and for other purposes has been recognized both by Congress and by the courts—by Congress in enacting subsequent appropriation acts, appropriating money therefor, or other acts, as in this particular case by the act of May 27, 1902, and by the joint resolution No. 24 (32 Stat., pt. 1, 245–277), and joint resolutions Nos. 25 and 31 (32 Stat., pt. 1, 742–744).

After referring to *Grisar* v. *McDowell* the court added:

The same was held of an Indian reservation created by Executive order in *United*

> *States* v. *Leathers*, 6 Sawy., 17, Fed. Cas. No. 15581, *United States* v. *Sturgeon*, 6 Sawy., 29, Fed. Cas. No. 16412, and *United States* v. *Payne* (D. C.), 8 Fed., 883. There can be no doubt that such a reservation by proclamation of the Executive stands upon the same plane as a reservation made by treaty or by act of Congress.

In *United States* v. *Martin* (14 Fed., 817, 822) the court, comparing Indian reservations established by treaty and Executive order, held that "the difference in the mode of establishing the two reservations is not material" to their status.

Attorney General Brewster, January 17, 1882 (17 Op., 258), answered affirmatively a question propounded by the Secretary of the Interior as to whether the President had authority to make a reservation for Indians from public land lying within the boundaries of a State. *Grisar* v. *McDowell* and *Wolcott* v. *Des Moines Co., supra,* are cited. The opinion then proceeds (p. 260):

> It has been shown above that the President has the power *generally* to reserve lands from the public domain for public uses.
>
> In the cases cited the reservation has been for military purposes or for public improvements. Is a reservation for occupation by Indians a reservation for a public use?
>
> By the acts of July 9, 1832 (4 Stat., 564), and 30th of June, 1834 (4 Stat., 738), a Bureau of Indian Affairs was established, and extensive powers were given to the President in the control and management of

> the Indians, and our statute book abounds with legislation concerning the Indian and Indian tribes. The regulation of the relations of the Government with these tribes is a great public interest, and their settlement upon reservations has been considered a matter of great importance. Indeed it has been the settled policy of the Government for many years.
>
> A reservation from the public lands therefore for Indian occupation may well be regarded as a measure in the public interest and as for a public use. Congress has in numerous acts of legislation recognized it as such. These statutes need not be particularly referred to; they are scattered through the statute book; indeed the annual Indian bill is full of such recognitions.

See, also, the opinion of Attorney General Miller of July 31, 1889 (19 Op., 371), holding that an act limiting Indian reservations to 640 acres in the Territory of Oregon was not operative in Montana, and that the President was fully empowered to make a reservation of larger dimensions. He states (p. 373):

> In my opinion the validity of the Executive order of August 5, 1878, and that of February 19, 1877, to which it was supplemental, rest not on that statute but on a long-established and long-recognized power in the President to withhold from sale or settlement, at discretion, such parts of the national domain, open to entry and settlement, as he may deem proper. This power Con-

gress recognizes in the legislation above discussed, *which does not grant any such power, but only seeks to restrict one already existing.* When Congress creates an exception from a power, it necessarily affirms the existence of such power, and hence the well-known axiom that the exception proves the rule.

* * * * *

In addition to this congressional recognition the Supreme Court of the United States has repeatedly adjudged the existence of this power in the President.

If the foregoing quotations and those which are to follow shall seem too extensive and reiterative, our excuse lies in the desire to show clearly, not only that the power of reservation has been implied so often for specific public purposes, but also that it has been repeatedly and customarily exercised with the acquiescence of Congress and that, in the opinion of learned jurists, it is applicable to public purposes in general.

(*c*) *Authorities sustaining reservations made in aid of proposed legislation.*

By the act of August 8, 1846 (9 Stat., 77), Congress granted to the then Territory of Iowa, to enable it to improve the navigation of the Des Moines River from its mouth to the Raccoon Fork, "one equal moiety, in alternate sections, of the public lands in a strip five miles in width on each side of said river." A doubt very soon arose as to whether or not the grant was intended to extend to

lands lying along the river beyond the fork. Because of this doubt the lands were withdrawn throughout the length of the river, although no reservation whatever was directed by the act itself.

In the case of *Wolcott* v. *Des Moines Co.* (5 Wall., 681), which arose after this court, in *Dubuque & Pacific R. Co.* v. *Litchfield* (23 How., 66), had decided that the grant *did not* extend above the fork, the question was presented squarely whether the order of withdrawal, in so far as it affected the lands above the fork, was valid. An act passed in 1856 had granted to the State of Iowa lands to aid in the construction of certain railroads, with a proviso excepting all lands theretofore reserved to the United States by any act of Congress or in other manner *by competent authority* for the purpose of aiding in any object of internal improvement. But for the withdrawal order, the lands affected by the litigation would have passed under this railway grant, and the question was whether the withdrawal constituted a reservation by competent authority within the meaning of the proviso. The court held that it did. In the opinion (p. 688) it is said:

> It has been argued that these lands had not been reserved by competent authority, and hence that the reservation was nugatory. As we have seen, they were reserved from sale for the special purpose of aiding in the improvement of the Des Moines River—first, by the Secretary of the Treasury, when the Land Department was under his super-

vision and control, and again by the Secretary of the Interior, after the establishment of this department, to which the duties were assigned, and afterwards continued by this department under instructions from the President and Cabinet. *Besides, if this power was not competent, which we think it was ever since the establishment of the Land Department and which has been exercised down to the present time,* the grant of 8th August, 1846, carried along with it, by necessary implication, not only the power, but the duty, of the Land Office to reserve from sale *the lands embraced in the grant.* Otherwise its object might be utterly defeated. Hence, immediately upon a grant being made by Congress for any of these public purposes to a State, notice is given by the Commissioner of the Land Office to the registers and receivers to stop all sales, either public or by private entry. Such notice was given the same day the grant was made, in 1856, for the benefit of these railroads. That there was a dispute existing as to the extent of the grant of 1846 in no way affects the question. The serious conflict of opinion among the public authorities on the subject made it the duty of the land officers to withhold the sales and reserve them to the United States till it was ultimately disposed of.

It will be observed that, in the opinion of the court, the power to withdraw existed without regard to the duty implied from the act of 1846 to withdraw the lands *embraced in the grant only.*

In *Riley* v. *Welles* (decided at the December term, 1869), 154 U. S., 578, the court held that the lands above the fork were not subject to entry under the preemption act of 1841.

In *Williams* v. *Baker* (17 Wall., 144), and *Homestead Co.* v. *Valley Railroad* (ib., 153), the grant of 1846 was considered and the previous decisions upholding the withdrawal order were examined and approved. In both of those cases it was held that the lands within the withdrawal did not pass under the railroad grant of 1856.

In *Wolsey* v. *Chapman* (101 U. S., 755), it was decided that the withdrawal under the act of 1846 operated to prevent the selection of lands to satisfy a grant made to the State of Iowa in 1841 by Congress. We quote from page 768 of the opinion:

> It is conceded that the lands in controversy were actually reserved from sale by competent authority when the selection was made under the act of 1841. They were reserved *also* in consequence of the act of 1846. The proper executive department of the Government had determined that, because of doubts about the extent and operation of that act, nothing should be done to impair the rights of the State above the Raccoon Fork until the differences were settled, either by Congress or judicial decision. For that purpose an authoritative order was issued, directing the local land officers to withhold all the disputed lands from sale. This withdrew the lands from private entry,

> and, as we held in *Riley* v. *Wells*, was sufficient to defeat a settlement for the purpose of preemption while the order was in force, notwithstanding it was afterwards found that the law, by reason of which this action was taken, did not contemplate such a withdrawal.

The decision of this court, holding that the grant did not extend above the fork, was rendered in 1860. Thereupon the State, through her congressional delegation, sought a new grant to overcome the effects of the decision; and, as this court observed in the case next to be considered, "the whole subject was thus laid before Congress." That body first passed a joint resolution, in 1861, providing that the titles still retained by the United States in tracts along the river above the fork, which had been certified to the State improperly by the Land Department, and which were then held by *bona fide* purchasers from the State, be relinquished. This resolution, it will be observed, did not grant to the State any lands which had not previously been selected and certified and actually sold to *bona fide* purchasers. The following year, however, an act was passed which granted such lands also.

In *Bullard* v. *Railroad Co.* (122 U. S., 167) the plaintiff claimed title by virtue of certain preemption settlements made after the resolution of 1861 but prior to the act of 1862, and the object of his bill was to have the court declare that his title under those settlements was superior to the title which

that act conferred upon the State and her grantees, his contention being that the force of the withdrawal order ended with the joint resolution, so as to leave the lands open to acquisition under the preemption law. The court, however, decided that the order must be deemed effective, even after the resolution, as an authorized act of the Executive withholding the lands from other disposition *until the question whether they should or should not be granted to the State could be determined by Congress.* After pointing out that in 1860 the Commissioner of the General Land Office had notified the local officers that the lands would continue "reserved for the time being from sale or from location by any species of scrip or warrants, notwithstanding the recent decision of the Supreme Court against the claim," in order to afford time for further legislation, the court observed (pp. 173–175):

> It will thus be seen that, notwithstanding the decision of the Supreme Court of the United States in the winter of 1860, the land office determined that the reservation of these lands should continue for the purpose of securing the very action by Congress which the State of Iowa was soliciting, and it is not disputed by counsel for the appellant in this case that this was a valid continuation of such reservation and that during its continuance the preemptions under which the plaintiff claims could not have been made. But it is argued that the joint resolution of 1861 terminated this condition

of suspense, and in and of itself ended the withdrawal of these lands which had been established and continued since the controversy originated between the State and the Federal Government as to the extent of the grant. This is the only foundation on which plaintiff's title to the land in controversy in this case rests.

We do not think the joint resolution had the effect to end the reservation of these lands from public entry. Whether we consider the purpose of the original order, its long continuance, and that it has been held, in the face of an act of Congress granting lands for public purposes to the railroads already mentioned, to constitute such a withdrawal as that act excepts from the operations of the grant, and that up to the present time no preemptions or sales have been finally recognized as valid by the department or by the courts, it would be very extraordinary if the joint resolution should have that effect. It does not purport to act upon all the matters which were in controversy between the State and the General Government. It certainly did not act upon all the claims and matters in question then pending before Congress in regard to these lands. It was, indeed, a very limited disposition of a part of the matter *which Congress supposed might then be acted upon with safety without further investigation.* It was simply the recognition of the title which had passed to the grantees of the State of Iowa in regard to the lands which had been certified by the

proper authorities of the General Government to the State under the act of 1846, and which, by the decision in *Dubuque & Pacific Railroad* v. *Litchfield*, had been held to be unwarranted by the statute.

* * * * *

The broader and larger question of the title to the lands within 5 miles of the Des Moines River, above Raccoon Fork, which had not been certified to the State, and which were declared by the decision of *Dubuque & Pacific Railroad* v. *Litchfield* not to be included within the grant of 1846, Congress retained for further consideration, and, at its next session after this joint resolution was passed, it completely disposed of the whole subject, so far as it was within its power to do so, by validating the grant of 1846 to the full extent of the construction claimed by the State of Iowa. If the order of the Commissioner of the General Land Office of May 18, 1860, was in force up to the passage of the joint resolution, it is not possible to perceive why it terminated then. It was declared by the commissioner that the order or notice was made to protect these lands from location by any species of scrip or warrant, notwithstanding the decision of the Supreme Court to afford time for Congress to further consider the case.

This is not the way in which a reservation from sale or preemption of public lands is removed. In almost every instance, in which such a reservation is terminated, there has been a proclamation by the President that

> the lands are open for entry or sale, and in most instances they have first been offered for sale at public auction. It can not be seen, from anything in the joint resolution, that Congress either considered the controversy ended or intended to remove the reservation instituted by the department. Its immediate procedure at the next session to the full consideration of the whole subject shows that it had not ceased to deal with it, that the reason for this withdrawal or reservation continued as strongly as before, and it can not be doubted that the subject was before Congress, as well as before its committees, and that the act of July 12, 1862, was, for the first time, a conclusion and end of the matter so far as Congress was concerned.

Three propositions were decided in those cases, viz:

1. That it is within the *general* implied power of the Executive to withdraw lands from private entry.

2. That when a grant is made by Congress, the Executive has authority, implied from the duty to execute the grant, to withdraw not only the lands actually granted, but also other lands which, though not intended to be granted, may seem so because of an uncertainty about the proper construction of the granting act, and that such a withdrawal of lands *dehors* the grant will remain effective until the uncertainty has been finally dispelled.

3. That even after it has been finally determined, by the highest judicial authority in the land, that lands thus reserved were never intended to be granted, the Executive has authority to continue to withhold them from settlers and other claimants under the general laws for the sole and express purpose of affording Congress time to determine whether or not it will add those lands to the lands already granted.

Now, passing the first of these propositions, which goes far beyond any contention that we are obliged to make, the specific principle underlying the third is exactly applicable to our case. The authority which it concedes is in no sense an authority implied from a duty to execute an existing law; it is an authority implied from the duty to assist in the effectuation of a law which has not been made but which ought to be and in all probability will be made.

In the case of the Des Moines River grant legislation was proposed which ultimately was passed as anticipated, and if the power of reservation had not existed the purpose of the legislation would have been defeated. The same is true in this case. In that case the pending bills contemplated a disposition of the lands in a way at variance with the ways provided by existing law. So in this case.

Any effort of the defendants to distinguish the Des Moines River cases upon the bare ground that the reservation continued only because it was not

technically revoked must fail. A perusal of the opinions brings conviction that, in the judgment of this court, the reservation remained effective, even after the scope of the original grant had been settled, not because no formal action had been taken by Congress or the Executive to revoke it, but because the *purpose* for which it was retained had not been completely satisfied. This presupposes a continuing lawful purpose. Clearly, if it was not lawful for the Executive, by positive action, to make a new reservation for the purpose of aiding the anticipated legislation, the Executive was powerless to achieve the same (unlawful) result merely by refusing to declare the revocation of a reservation made for another purpose, and whose *raison d'être,* in the eye of the law, had ceased to exist. The rule that a reservation once made persists until revoked by the power that created it has no application in a case where, by hypothesis, the authority to create and the lawful reasons for continuance have both come to an end. In such a case the status of the land could not be made to depend upon the intention of the creating agency. Consequently, it would be immaterial what that intention was respecting the continuance of the reservation or how it was expressed. In other words, more concretely, the Executive, its authority to reserve lands being dependent on the existence of certain facts, could not, by inaction any more than by action, withhold them from the public-land laws

when those facts were no longer present and when all legitimate reason for a reservation was gone.

In the Des Moines River cases, moreover, there were really *two* reservations based upon two different purposes. After the act of 1846 had ceased to afford an excuse for the reservation as originally made, the Land Department continued it *expressly* for a new purpose—to aid the proposed legislation.

In the *Bullard case,* the Supreme Court did refer to the fact that there had been no formal revocation by the President. But the court will see that this fact was adduced as evidence that the *purpose* of the reservation had not been fully accomplished. It had been argued that the passage of the resolution of 1861 fulfilled the purpose and impliedly revoked the reservation, but the court held that the resolution constituted but a part of the expected legislation and that " the *reason* for this withdrawal or reservation continued as strongly " after the resolution " as before," and did not cease until Congress had legislated fully and finally by the act of 1862.

3. *Further discussion of the Executive practice and legislative recognition.*

[When not contained or mentioned in the printed publications cited, the Executive orders described below will be evidenced by certified copies.]

Reservations by the Executive for the purposes of military and Indian occupancy have been numerous and extensive. For many years it has been the practice to establish them when necessary, irre-

spective of the existence of statutory authority.[1] Such reservations have also been made for the purpose of supplying fuel and building and other materials for the use of military posts. Thus, by an order of April 6, 1859, President Buchanan, at the request of the Secretary of War, reserved from sale 100 acres of land, near Fort Bridges, Utah, including certain coal mines, for military purposes. In March, 1867, President Johnson, upon like request, reserved land for wood supply at Fort Wads-

[1] The procedure adopted in such cases is given in the authoritative public document entitled "The Public Domain" (published in pursuance of acts of Congress in 1884), pp. 243–248. That work also gives schedules of Indian reservations then existing, showing acreages, localities, and manner of creation, whether by treaty, statute, or Executive order. *Ib.*, 727, 1252. See also vol. 1 of Kappler's Laws and Treaties (S. Doc. 452, 57th Cong., 1st sess.), where at pp. 801 to 936 all Executive orders creating Indian reservations, from the organization of the Government to the year 1903, are published in full. Also "The Public Domain," pp. 250, 748, 1258, and the companion publication "Laws of the United States of a Local and Temporary Character," vol. 2, pp. 1171 to 1183, concerning military reservations. Lists of existing Indian and military reservations, showing the manner of their establishment, are found also in reports of the Commissioner of the General Land Office and of the Commissioner of Indian Affairs accompanying the annual reports of the Secretary of the Interior to Congress. There is no publication which can be relied on in determining whether a given Executive order was preceded by statutory authority. Slight investigation, however, is required to demonstrate that authority was absent in numerous cases, in many of which the reservations were subsequently dealt with as legitimate by acts of Congress, cited in the documents above referred to.

worth, Dakota Territory. Two other wood and timber reservations, for the use of Fort Robinson, in Nebraska, and Forts Sanders and D. A. Russell, and Cheyenne Depot, in Wyoming, were created by President Hayes, November 4, 1879, and the latter was enlarged by him February 25, 1880. On March 26, 1881, President Garfield extended the Fort Wingate Reservation in New Mexico (originally declared, with an area of 100 square miles, by an Executive order of 1870), the purpose of the extension being to supply the post with timber for necessary building materials, etc.[1] November 21, 1902, President Roosevelt reserved land to secure a deposit of clay for making roads on a military reservation in Alaska; and, November 25, 1905, upon the recommendation of the Secretary of War, he reserved lands on Chilkat Inlet for the purpose of supplying water to Fort Seward. Other similar instances will be found mentioned in the annual reports of the Interior Department.

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[1]An act of 1853 (10 Stat., 238) authorized the President "to make five reservations * * * in the State of California or the Territories of Utah and New Mexico bordering on said State, for *Indian purposes*." The reservations were to contain not more than *25,000 acres* each, and Indians *in California* were to be removed to them. This has been referred to by defendants as authorizing the Fort Bridges and Wingate Reservations, *supra*. Defendants also explained the Dakota and Wyoming Reservations by reference to an appropriation made in 1855 (10 Stat., 608) of ten thousand dollars "for the *establishment* of military *posts*" in Kansas and Nebraska.

On September 1, 1837, the Secretary of the Treasury, at the request of the Secretary of War, directed the Commissioner of the General Land Office to cause certain lands at Sturgeon Bay, Wis., "to be reserved from sale according to law." The object was to conserve a supply of building stone for harbor improvements. The reservation is still intact.

On March 22, 1880, President Hayes reserved a large body of public land in Wisconsin and Minnesota for reservoir purposes. Congress, by an approportion act of June 18, 1878 (20 Stat., 152, 162), had directed the Secretary of War to cause an examination to be made of the sources of the Mississippi River and certain other rivers in those States, in order to determine the practicability and cost of creating and maintaining reservoirs for the purpose of improving their navigation. The Secretary was also directed to make an estimate of the damage that would result to property of any kind. Later the Secretary made his report and recommendations to Congress, and the withdrawal was made without any antecedent congressional authority, but in aid of that report and in the anticipation that the lands withdrawn "will be affected in the event of affirmative congressional action upon said report."

A withdrawal of additional lands in the States mentioned was made by President Arthur, February 20, 1882, for the same purpose, but *after* appropriations for the construction of the reservoirs had

been made by the act of June 14, 1880 (21 Stat., 180). By the act of June 20, 1890 (26 Stat., 169), Congress authorized the President to restore the withdrawn lands to entry under the homestead laws. Section 2 of that act provided that, if any of the lands had been disposed of by proper officers of the United States under color of the public land laws, and the consideration received therefor was retained by the Government, the title of the purchasers might be confirmed by the Secretary of the Interior, etc.

Withdrawals have been made extensively, during many years, for a variety of purposes not above mentioned, as to correct surveys; to avoid conflicts with private claims; to *prevent frauds;* to ascertain character of land, etc. See the letter of the Acting Secretary of the Interior, of March 3, 1902, in response to a Senate resolution calling for information as to " what, if any, of the public lands have been withdrawn from disposition under the settlement or other laws by order of the Commissioner of the General Land Office, and what, if any, authority of law exists for such order of withdrawal " (S. Doc. No. 232, 57th Cong., 1st sess.) and see the argument of the commissioner in defense of the practice, and the lengthy schedule of withdrawals attached to the Secretary's letter.

The reports of the Secretary of the Interior and Commissioner of the General Land Office for the years 1900, pages LI, 75, and 1901, pages LXIII,

87, show that the department withdrew from agricultural entry 78 townships of supposed oil land in California in aid of an investigation of its character and to prevent the unlawful application of lieu selections, etc., and that the fact was made known to Congress. Congress was also aware that nearly 70,000,000 acres of coal land were withdrawn in the years 1906–7 to verify the existence of coal deposits, the reason being that serious frauds had been perpetrated. (Rep. Sec. Int., 1907, p. 13, *id.* Comm'r G. L. O., p. 251.) In 1896 and 1899 orders were made temporarily reserving the "Petrified Forest" in Arizona for a proposed national park. These also were reported to Congress. (Rep. Comm'r G. L. O., 1900, p. 87.) The land including the Wind Cave in South Dakota, which was made a national park by the act of January 9, 1903 (32 Stat., 765), was first reserved by the Executive in 1900, without statutory authority, but in the expectation that Congress would act, as it did. (Commissioner's Report, 1900, p. 91.) By the Commissioner's report for 1902 (p. 319) Congress was apprised of temporary reservations made for the purpose of creating State parks in California and Michigan.

Prior to June 28, 1906, the President had created six reservations for the protection of birds. (Rep. Sec. Int. 1909, p. 43.) On that date Congress passed a statute making it an offense to take or interfere with birds, or their eggs, "on any lands

of the United States which have been set apart or reserved as breeding grounds for birds by any law, proclamation, or Executive order," etc. (34 Stat., 536.) The fact of the prior reservations had been called to the attention of Congress, and this is one of very numerous instances in which the action of Congress evinces its approval of the executive practice.

September 26 and November 4, 1905 (34 L. D., 245), the Secretary of the Interior directed that all applications to enter, select, purchase, or locate isolated and disconnected tracts embracing less than 40 acres, presented after November 15, 1905, should be received and suspended without further action. This suspension was made with the view to submitting to Congress the advisability of making provision for the disposition of such tracts other than that provided by the laws then in force. The result of the suspension and the subsequent recommendation of the department was the act of Congress approved June 27, 1906 (34 Stat., 517), providing a method for the disposition of isolated and disconnected tracts.

June 22, 1906, the President withdrew a large area in Wisconsin, in aid of a bill authorizing that State to select certain lands. The bill was subsequently passed. (See 35 L. D., 11; 34 Stat., 517.)

The act of April 28, 1904 (33 Stat., 525), conferred upon qualified persons the right to purchase coal lands in Alaska at a fixed price of $10 per acre.

November 12, 1906, all coal lands in Alaska were withdrawn from entry by direction of the President. (35 L. D., 572.) By the act of May 28, 1908 (35 Stat., 424), the propriety of this action was distinctly recognized. That act made provisions in favor of persons who had in good faith made locations of Alaskan coal lands *prior to November 12, 1906.*

General recognitions of the Executive authority like those contained in the preemption acts cited in *Grisar* v. *McDowell, supra,* are found in a number of other statutes. Among these may be mentioned the town-site law of March 2, 1867 (14 Stat., 541), where the following proviso appears:

> That the provisions of this act shall not apply to military or other reservations heretofore made by the United States nor to reservations for lighthouses, customhouses, mints, or such other public purposes as the interests of the United States may require, whether held under reservations through the Land Office by title derived from the Crown of Spain or otherwise.

And the general allotment act of February 8, 1887 (24 Stat., 388, sec. 1), which provides:

> That in all cases where any tribe or band of Indians has been, or shall hereafter be, located upon any reservation created for their use, either by treaty stipulation or by virtue of an act of Congress *or Executive order*

the President may allot the land, etc.

The references and citations which we have given are illustrative merely, but an endeavor to render them complete would add to our brief enormously without serving any useful purpose. While it is possible that antecedent statutory authority, which we have overlooked, existed in some of the cases mentioned, it is certain beyond peradventure that the practice of reserving lands for public purposes without such authority, originating at an early day, has been constantly and increasingly exercised, has been perfectly well known to Congress from the beginning, has never been objected to, but has been recognized by Congress again and again as a practice wholesome and necessary to the welfare of the Government and not a practice of usurpation.

Much reliance has been placed by defendants upon the fact that Congress, in many instances, has affirmatively directed or authorized the making of reservations for purposes designated.

There is nothing in these affirmative statutes, however, which is repugnant to the existence of the President's implied authority. Congress has a habit of making special provisions that are covered by existing legislation. Witness, for example, the numerous unnecessary declarations that this or that act shall constitute perjury. It is often not aware of its own past enactments, or not certain of their legal effects, so that it covers the ground again out of abundant caution. Furthermore, there is no spe-

cial reason why Congress should think about this general implied authority of the President when it makes up its mind that specific reservations or reservations of a certain kind are or may be needed. Its own power over the subject is plenary, and its wish need but be expressed to be effective. When Congress directs or authorizes the President to make such reservations, it does not do so for the sake of conferring a new power or privilege upon him, it does so because it believes those particular reservations will be needed; its mind is on them rather than the ways of making them. It will be noticed that a majority of these special statutes are mandatory in form. Nearly all of them may properly be regarded as mandatory in substance—as declarations of an opinion or policy that specific reservations, or reservations of a certain character, should be created. Hence they are in the nature of commands to the President. Statutes of this kind are, indeed, more of a help than a hindrance to our case. They show a habit or policy of reserving lands for public needs.

In *United States* v. *Bailey* (9 Pet., 238) it was decided that the Secretary of the Treasury, being empowered by statute to pass upon certain claims, was authorized to require proof by affidavit, and that false matter in such an affidavit was perjury. *There was no statutory authority for the affidavit.* But, in sustaining the Secretary's implied authority to exact it, the court relied very largely on the prac-

tice to do so and on the fact that Congress had granted such authority *in other* cases. We quote from the opinion (p. 254):

> It is certain, that the laws of the United States have, in various cases of a similar nature, from the earliest existence of the Government down to the present time, required the proof of claims against the Government to be by affidavit. In some of these laws, authority has been given to judicial officers of the United States to administer the oaths for this purpose; and at least as early as 1818 a similar authority was confided to State magistrates. The citations from the laws, made at the argument, are direct to this point and establish in the clearest manner *a habit of legislation* to this effect. It may be added that it has been stated by the Attorney General, and is of public notoriety, that there has been a constant practice and usage in the Treasury Department, in claims against the United States, and especially of a nature like the present, to require evidence by affidavits, in support of the claim, whether the same has been expressly required by statute or not; and that, occasionally, general regulations have been adopted in the Treasury Department for this purpose. Congress must be presumed to have legislated under this known state of the laws and usage of the Treasury Department. The very circumstance, that the Treasury Department had, for a long period, required solemn verifica-

> tions of claims against the United States, under oath, as an appropriate means to secure the Government against frauds, without objection, is decisive to show that it was not deemed a usurpation of authority.

In *Robertson* v. *Downing* (127 U. S., 607, 613) the court said:

> This construction of the department has been followed for many years, *without any attempt of Congress to change it,* and without any attempt, as far as we are advised, of any other department of the Government to question its correctness, except in the present instance. The regulation of a department of the Government is not of course to control the construction of an act of Congress when its meaning is plain. But when there has been a *long acquiescence* in a regulation, and by it rights of parties for many years have been determined and adjusted, it is not to be disregarded without the most cogent and persuasive reasons.

The important facts are that the President has exercised the implied authority persistently and increasingly, and that, so far as appears, *Congress has never to this day repudiated his action in a single instance, but, on the contrary, has repeatedly recognized it as legitimate.* These repeated acts of Congress have not operated merely to ratify particular acts of the President, as the defendants suppose; they have operated to confirm the Executive *practice;* their result is to confer a continuing

authority (if it did not exist independently). Tested by the general principles of agency, as applicable to private individuals and corporations, the authority would not be open to question.

> *United States Bank* v. *Dandridge* (12 Wheat., 64, 70).
>
> *Colorado Springs Co.* v. *American Pub. Co.* (C. C. A., 8th Cir.) (97 Fed., 843, 851).

The cases which we have already cited suffice to show that the legislative consent may be inferred from the indirect approval or even the mere acquiescence of Congress. See, also, *Wells* v. *Nickles* (104 U. S., 444, 447).

In *United States* v. *Macdaniel* (7 Pet., 1), where the authority of the Secretary of the Navy to employ and pay a clerk in his department was sustained, although there was no statute permitting such an employment, the court said (p. 14):

> It is insisted, that as there was no law which authorized the appointment of the defendant, his services can constitute no legal claim for compensation, though it might authorize the equitable interposition of the legislature. That usage, without law or against law, can never lay the foundation of a legal claim, and none other can be set off against a demand by the Government. A practical knowledge of the action of any one of the great departments of the Government, must convince every person, that the head of a department, in the distribution of

its duties and responsibilities, is often compelled to exercise his discretion. He is limited in the exercise of his powers by the law; but it does not follow, that he must show statutory provision for everything he does. No government could be administered on such principles. To attempt to regulate, by law, the minute movements of every part of the complicated machinery of government, would evince a most unpardonable ignorance on the subject. Whilst the great outlines of its movements may be marked out, and limitations imposed on the exercise of its powers, there are numberless things which must be done, that can neither be anticipated nor defined, and which are essential to the proper action of the Government. Hence, of necessity, usages have been established in every department of the Government, which have become a kind of common law, and regulate the rights and duties of those who act within their respective limits. And no change of such usages can have a retrospective effect, but must be limited to the future. Usage can not alter the law, *but it is evidence of the construction given to it;* and must be considered binding on past transactions.

All that is necessary to confer the authority to make reservations is *the consent of Congress.*

That consent may be manifested *without an express statutory declaration of it.*

It *has been* manifested by the long, consistent executive and legislative practice exhibited in the preceding pages.

4. *Inapplicability of certain authorities relied on by the defendants.*

Of the numerous cases cited by the defendants in the court below not one can be said to deny the authority for which we contend.

In *United States* v. *Fitzgerald* (15 Pet., 405, 420), it appears that the land was actually entered under the preemption law by Fitzgerald before an effort was made to reserve it by the Secretary of the Treasury. The court said:

> It can not be pretended, that the land in controversy was reserved from sale by any act of Congress, *or by order of the President,* unless the direction of the Secretary of the Treasury to reserve it from sale, several months *after* it had been actually sold and paid for, could amount to such an order.

The court also held that the mere occupancy by Fitzgerald, who happened to be a subordinate officer of the customs, could not amount to a public appropriation of the land. This case is fully explained in *Scott* v. *Carew* (196 U. S., p. 112).

*United States* v. *Copper Company* (196 U. S., 207); *United States* v. *George* (228 U. S., 14, 20); and similar cases, declare simply that the departments, under guise of making regulations to execute a law, can not add to or take from the requirements of the law itself and thus defeat its purpose.

The decisions upon which the defendants have chiefly relied concerned withdrawals made in supposed pursuance of certain acts granting lands in

aid of railways. We refer to the decisions of Secretary Lamar in the case of the *Atlantic & Pacific Railroad* (6 L. D., 84, 87); of Secretary Vilas in the case of *Northern Pacific Railroad* v. *Miller* (7 L. D., 100, 112); of Secretary Smith in *Northern Pacific Railroad* v. *Davis* (19 L. D., 87, 88), and decisions of this court in *Hewitt* v. *Schultz* (180 U. S., 139), *Nelson* v. *Northern Pacific Railroad* (188 U. S., 108), *Brandon* v. *Ard* (211 U. S., 11), and a number of other cases of like character.

These authorities, properly understood, have no bearing upon the present case.

The withdrawals there in question were made for the purpose of giving to the railway grantees a preference in certain lands, and were made upon the theory that the granting acts so intended. It was found that there was no such intention in the acts, but that, on the contrary, they expressed an intention, affirmatively, to leave the lands open to acquisition under other laws. Thus the withdrawals would have operated to take the lands from one claimant and give them to another, in violation of the expressed will of Congress. The withdrawals, therefore, were based entirely upon a mistake of law. Their sole object was to carry out the granting acts, but their real, legal effect was to defeat those acts and the other land laws involved. *Brandon* v. *Ard*, for instance, holds that it was not the intention of the granting act to reserve for the railway any right to specific land, until its line

of route was fixed and approved, and that it was the intention to allow homesteaders and other claimants free play before that time arrived. Consequently the premature withdrawal tended not to aid but to contravene the law.

We do not contend that the Executive has any implied or inherent power to *dispose* of public lands, much less that he may withhold them from settlement for the purpose of conveying them to a railway corporation in defiance of the will of Congress.

The general result of the decisions on railway grant withdrawals has been well expressed by the court below in another case:

> From the time of the earliest railroad land grants it was the practice of the chief officers of the Land Department, to whom was committed the administration of such grants, to withdraw from settlement, entry, and sale the public lands along the line or route of the road so aided, in advance of its definite location, in order that the lands might be preserved for the ultimate satisfaction of the grant. Such withdrawals, where not made in opposition to the terms of the grant or other congressional enactment, have been uniformly declared to be reservations made by competent authority and to be efficient to remove the lands therein from the category of public land and to exclude them from subsequent railroad land grants containing no clear declaration of an intention

> to include them; and this, even though it subsequently transpired that the withdrawal was ill advised, or that the lands therein were not required for the satisfaction of the grant.
>
> *Northern Lumber Co.* v. *O'Brien*, 139 Fed., 614, 617.

In *Leecy* v. *United States* (190 Fed., 289) it was held that the Secretary of the Interior could not withhold timberlands in the White Earth Indian Reservation for the benefit of certain Indians, and refuse to allot them to others who, by the Nelson Act of 1889, the agreement made under it, and the Steenerson Act of 1904, were entitled to allotments. That legislation made all the land of the reservation allottable, in effect directing that it be divided among all the Indians, and there was no legislation which gave any preference to the Indians for whom the Secretary was seeking to use the timber. The attempt was not to reserve public land for public purposes, but to devote what was in essence private land to one set of co-owners to the exclusion of others, contrary, as the court held, to the intention of Congress.

*Lockhart* v. *Johnson* (181 U. S., 516, 520) decided that the mere existence *sub judice* of a private claim based on a Spanish grant will not prevent locations under the public-land laws. Not even remotely was the implied power of the President involved.

Defendants have also quoted excerpts from an opinion by Attorney General Knox (23 Op., 589).

It was there held that the Secretary of the Interior had no implied authority to prohibit hunting on national forests for the sake of protecting game. The opinion notices that not only was there no law " or usage " to support such a regulation, but that it had always been the " long settled policy of the Government in favor of the people " to allow free access to the public lands for the purpose of hunting, trapping, and fishing. The gist of the opinion is in the following extract (p. 591):

> While the management and control of the public lands, except as otherwise provided by law, is committed to the Secretary of the Interior, this, even to the extent committed to him, is not absolute, but is a management and control subordinate to and for the purposes and objects intended, as expressed by law *or settled usage or practice.* He is but the agent of the Government for carrying out its purposes, and the rules and regulations which he makes can be such only as have relation to and subserve those purposes. He can not permit that which the law or the settled policy of the Government forbids, nor can he forbid what is thus permitted.

Those who would defeat this withdrawal have made much of a doubt which was expressed by President Taft in his message of January 14, 1910:

> The present statutes, except so far as they dispose of the precious metals and the purely agricultural lands, are not adapted to carry out the modern view of the best disposition

> of public lands to private ownership, under conditions offering on the one hand sufficient inducement to private capital to take them over for proper development, with restrictive conditions on the other which shall secure to the public that character of control which will prevent a monopoly or misuse of the lands or their products. The power of the Secretary of the Interior to withdraw from the operation of existing statutes tracts of land, the disposition of which under such statutes would be detrimental to the public interest, is not clear or satisfactory. This power has been exercised in the interest of the public, with the hope that Congress might affirm the action of the Executive by laws adapted to the new conditions.

It is well known that the existence of a general authority in the President to withdraw lands had been seriously questioned by many who were in favor of allowing free and unrestricted privileges in the public domain, and that this view was shared, to some extent at least, by high officials in the Interior Department. As we have seen, the Public Lands Committee of the Senate came to a different conclusion. But, without attempting to speculate as to how far Mr. Taft's uncertainty was the result of his independent researches, it seems enough to observe concerning it, that it was but an uncertainty, not a conviction; that it was properly resolved in favor of the public; and that, so far as we know, it did not relate to a withdrawal made under the

circumstances and for the purposes attending this withdrawal of oil land.

## II.

**In the absence of any congressional inhibition, the President, of national necessity and by the very nature of his functions under the Constitution, is impliedly authorized to reserve public land for public purposes.**

1. *This authority is subordinate to the power of Congress.*

It may here be observed, once for all, that the plenary power of Congress to determine whether reservations shall or shall not be made is conceded. Whatever authority the President may have in that regard, whether conferred by statute or derived by implication, may be taken away from him by an act of Congress. Throughout our argument we recognize this as axiomatic.

2. *The authority involves no conflict with the general land laws.*

These laws are in essence mere offers whereby any qualified person, by performing certain conditions, may select and acquire particular parcels out of the great mass of public lands. They are not to be construed as dedicating the entire public domain as a bounty to the prospective beneficiaries. No individual can acquire any right until he has connected himself with some specific tract. Except as this is done, the lands remain the property of

the Government, and as fully subject to its use or disposition as though the general laws had never existed.

A reservation by the President is an appropriation of the specific tracts affected to the purpose for which the reservation is made. No individual who has not previously connected himself with the land thus appropriated can have a standing to complain of the reservation, unless he can show, first, that he himself has the qualifications and has performed the conditions required by a general law, and, secondly, that the President was not competent to make the appropriation for the ends in view. The first he may establish by invoking the general law, but the second he may not establish in that way, since such laws work no change in the status of the land itself, as vacant public land, on the one hand, nor do they contain terms which either expressly or by implication limit the power of public appropriation, on the other. Indeed, as we shall show conclusively under our third general proposition, it would be wholly unpermissible to construe such a law as abridging such a power.

In this case the defendants invoke the mining law, in the first place, to establish their status as qualified claimants, which is, of course, logical and necessary. But in the second place, they advance it as a negation of the President's authority. In this there is serious error and confusion. The mining law can have no legitimate bearing upon

the validity of the President's act, except in so far as it may be truthfully said that his purpose was to defeat the purpose of the mining law. But such, as we have seen, is not the fact. His immediate purpose was to insure an adequate oil supply for a very important public use. This purpose was entirely consistent with the mining law. It affected, and therefore alone suffices to sustain, the entire reservation. It was to be accomplished either by a definite segregation of lands, sufficient in quantity and quality, or through the medium of exceptions and conditions to be imposed in the disposition of oil or oil lands to private interests, or in both of these ways, as Congress might determine. Of course the means are no concern of the defendants if they may not challenge the purpose. Even if it were true that the purpose, and the sole purpose, was to afford Congress opportunity to prevent immediate and irreparable waste, it would not follow that the reservation was at war with the purpose of the mining act. The conditions upon which the President acted and the results which he sought to avoid were such as could not have been anticipated by Congress when it offered these lands to the public.

*3. Reservations for public purposes may be demanded as a duty to the Nation.*

When the United States owns land which, either by reason of its location or its character, is suited to supply a national necessity, it seems super-

fluous to suggest that, in the absence of other controlling considerations, the land should be devoted to the necessity. Particularly is this true when the need for the land is in some sense vital and doubts exist whether, if the land were lost, a substitute could be found by purchase or otherwise. Throughout the history of this country it has been customary for Congress to devote public lands to public uses whenever they were suitable, and the President has been constantly availing himself of them in the performance of his duties.

It may therefore be safely assumed as a national policy, that, primarily, the public lands are devotable to national needs, and that this policy is paramount over any which looks to their sale or donation to individuals. Of course, Congress, in the plenitude of its power, *could* adopt and enforce a different policy—even the policy of a spendthrift; but this is not to be presumed in the absence of clear evidence of an intention to do it. The enactment of a general law permitting purchase by individual is no evidence of a policy to sell regardless of direct public needs.

4. *The duty to make reservations for public purposes is one which necessarily must be delegated to the President for its efficient performance in emergencies.*

Oddly enough, the necessity for Executive action to insure promptness in emergencies was questioned in the court below, counsel gravely asserting that Congress should be appealed to and that Con-

gress would act promptly if it thought prompt action necessary. The difficulty with this is that it contradicts all experience. Legislative bodies sometimes act quickly, but more frequently their proceedings are subject to tedious obstructions and delays. This procrastination, and the public notoriety which attends their deliberations, unfit such bodies for the performance of those acts of government which demand celerity, and for those also which demand secrecy in preparation. This truth, well understood by all, played an important part in the division of powers when the Constitution was formed, and is well stated by Justice Story in his work on constitutional law. He places the slowness of the processes of Congress among the reasons for not giving it control of the Army and Navy (*loc. cit.*, sec. 1491) and, treating of the reasons for lodging the pardoning power with the President, observes:

> A still more satisfactory reason is, that the legislature is not always in session, and that their proceedings must be necessarily slow, and are generally not completed until after long delays. (Ib., sec. 1500.)

So of the making of treaties:

> The House or the Senate, if in session, could not act until after great delays, and in the recess could not act at all. (Ib., sec. 1511.)

See also *Ohio Life Ins., &c., Co.* v. *Debolt*, 16 How., 416, 435.

If proof of so plain a proposition were needed, it would be found in the case of these oil lands in Wyoming and California. Though the lands were withdrawn by the President in September, 1909, and though the vast importance of retaining them was well known before that time, and was brought out clearly before Congress soon afterwards by presidential messages and widespread public discussion, it was not until late in June of the following year that legislation occurred. In the meantime the predecessors of these defendants, and hordes of other persons, hoping that the order might be adjudged technically void, entered upon the lands reserved and went through the forms of location.

In view of the vast extent and diversified character of the public domain, and in view of the great variety of the public uses of which it is susceptible, it is evident that Congress can not provide in advance specifically all the measures that may be necessary to protect the lands and insure their proper devotion to the public interest in every possible contingency. Contingencies which Congress did not and could not foresee are certain to arise from time to time, requiring that something be done immediately to protect some part of this great property from waste or other injury, or demanding that some portion of it be used for an important public purpose, or be preserved for such use in the future. To say that the possibility of safeguarding

the public interests depends in every such case upon whether, perchance, a statute already exists to fit the situation is to say that our system of government is defective, since it leaves the Nation without adequate protection in serious emergencies. If the President were obliged to request antecedent authority of Congress, the delay would be so great that lands of the utmost importance for public uses would pass into private ownership. Indeed, the very introduction of the bill might call attention to them and insure their loss.

5. *The duty to act in case of necessity devolves upon the President as a part of his constitutional responsibility.*

It has been customary to connect this authority with the consent of Congress as manifested in legislation, or as implied from tacit acquiescence in repeated assumptions of the authority. But, while the authority could not exist against the will of Congress, express or implied, it is not at all necessary to stake its existence upon the conception of authority actually delegated by Congress. It is entirely logical to infer the power out of the Constitution, from the very necessity for its existence and from the functions of the President in our Government.

The public lands are property of immense importance to the Nation. They are constantly demanding protection against trespass, spoliation, and fire. Protection implies action, and action can

only come from the Executive. If Congress has not empowered him to act by a statute, he must act in emergencies without one. This is a proposition which no one, however rash, would venture to deny.

But the concession of so much absolutely requires the concession of more. This property is not merely held to give away or sell. Portions of it are of incalculable value for governmental uses. The uses may be immediate and pressing, or they may be certain to arise in the future. They may require the appropriation of lands of a particular character, or lands located at particular places, to such an extent that loss of the lands may work irreparable public injury. Now, in such cases, the duty of those who represent the Government is plain. The lands should be devoted to the public needs, and whatever is necessary to that end should be done in the right way and at the right time. Of course, it may be argued that as Congress is the judge of what is expedient for the welfare of this country in the use or disposition of the public lands, and as Congress may decide that it is wiser to give them away, however imperative in fact may be their retention and use by the Government, no one is authorized to know that a public need exists until Congress has said so. But we pass this thought as offensive to common sense, and in the belief that it is too absurd to figure for a moment in an honest effort to ascertain the self-protecting powers of an

efficient government. In the circumstances supposed (and they could not better be realized than by the circumstances of the present case), it must be conclusively presumed that Congress, if given time to act, would decide wisely and reserve the lands.

The authority of the President to act in such emergencies, by protecting the lands from injury on the one hand or appropriating them for public uses on the other, must be held to exist, first, because, as we have shown, it is only thus that the public interests may be protected; secondly, because, as we shall show, his action implies not the slightest invasion of the province of Congress; and, thirdly, because such action is in entire harmony with and is, indeed, compelled by the general duties and responsibilities of the President. Reserving the second of these propositions for separate treatment, we will now elaborate the third.

Ours is a self-sufficient Government within its sphere. (*Ex parte Siebold*, 100 U. S., 371, 395; *in re Debs*, 158 U. S., 564, 578.) "Its means are adequate to its ends" (*McCulloch* v. *Maryland*, 4 Wheat., 316, 424), and it is rational to assume that its active forces will be found equal in most things to the emergencies that confront it. While perfect flexibility is not to be expected in a Government of divided powers, and while division of power is one of the principal features of the Constitution, it is the plain duty of those who are called upon to draw

the dividing lines to ascertain the essential, recognize the practical, and avoid a slavish formalism which can only serve to ossify the Government and reduce its efficiency without any compensating good. The function of making laws is peculiar to Congress, and the Executive can not exercise that function to any degree. But this is not to say that all of the *subjects* concerning which laws might be made are perforce removed from the possibility of Executive influence. The Executive may act upon things and upon men in many relations which have not, though they might have, been actually regulated by Congress. In other words, just as there are fields which are peculiar to Congress and fields which are peculiar to the Executive, so there are fields which are common to both, in the sense that the Executive may move within them until they shall have been occupied by legislative action. These are not the fields of legislative prerogative, but fields within which the lawmaking power may enter and dominate whenever it chooses. This situation results from the fact that the President is the active agent, not of Congress, but of the Nation. As such he performs the duties which the Constitution lays upon him immediately, and as such, also, he executes the laws and regulations adopted by Congress. He is the agent of the people of the United States, deriving all his powers from them and responsible directly to them. In no sense is he the agent of Congress. He obeys and executes the laws of Congress,

not because Congress is enthroned in authority over him, but because the Constitution directs him to do so.

Therefore it follows that in ways short of making laws or disobeying them, the Executive may be under a grave constitutional duty to act for the national protection in situations not covered by the acts of Congress, and in which, even, it may not be said that his action is the direct expression of any particular one of the independent powers which are granted to him specifically by the Constitution. Instances wherein the President has felt and fulfilled such a duty have not been rare in our history, though, being for the public benefit and approved by all, his acts have seldom been challenged in the courts. We are able, however, to present a number of apposite cases which were subjected to judicial inquiry.

In an opinion rendered by Solicitor General Richards, as Acting Attorney General, on January 18, 1898 (22 Op. 13, 25), it was held that the President was empowered, in the absence of any legislation on the subject, to prevent the landing on our shores of a foreign cable, and to forbid or supervise its operation, if it were landed. The following excerpt will show the reasoning which led to this conclusion:

> The preservation of our territorial integrity and the protection of our foreign interests is intrusted, in the first instance, to

the President. The Constitution, established by the people of the United States as the fundamental law of the land, has conferred upon the President the executive power; has made him the Commander in Chief of the Army and Navy; has authorized him, by and with the consent of the Senate, to make treaties, and to appoint ambassadors, public ministers, and consuls; and has made it his duty to take care that the laws be faithfully executed. In the protection of these fundamental rights, which are based upon the Constitution and grow out of the jurisdiction of this Nation over its own territory and its international rights and obligations as a distinct sovereignty, the President is not limited to the enforcement of specific acts of Congress. He takes a solemn oath to faithfully execute the office of President, and to preserve, protect, and defend the Constitution of the United States. To do this he must preserve, protect, and defend those fundamental rights which flow from the Constitution itself and belong to the sovereignty it created. (Mr. Justice Miller, *In re Neagle,* 135 U. S., 1, 63, 64; Mr. Justice Field, *The Chinese Exclusion case,* 130 U. S., 581, 606; Mr. Justice Gray, *Fong Yue Ting* v. *United States,* 149 U. S., 698, 711; Mr. Justice Brewer, *In re Debs,* 158 U. S., 564, 582.)

The President has charge of our relations with foreign powers. It is his duty to see that in the exchange of comities among na-

tions we get as much as we give. He ought not to stand by and permit a cable to land on our shores under a concession from a foreign power which does not permit our cables to land on its shores and enjoy *there* facilities equal to those accorded its cable *here*. For this reason President Grant insisted on the first point in his message of 1875.

The President is not only the head of the Diplomatic Service, but Commander in Chief of the Army and Navy. A submarine cable is of inestimable service to the Government in communicating with its officers in the Diplomatic and Consular Service, and in the Army and Navy when abroad. The President should, therefore, demand that the Government have precedence in the use of the line, and this was done by President Grant in the third point of his message.

Treating a cable simply as an instrument of commerce, it is the duty of the President, pending legislation by Congress, to impose such restrictions as will forbid unjust discriminations, prevent monopolies, promote competition, and secure reasonable rates. These were the objects of the second and fourth points in President Grant's message.

The Executive permission to land a cable is, of course, subject to subsequent congressional action. The President's authority to control the landing of a foreign cable does not flow from his right to permit it in the sense of granting a franchise, but from his power to prohibit it should he deem it an

> encroachment on our rights or prejudicial to our interests.

See also 29 Op., 579, 583.

In *United States* v. *La Compagnie Francaise des Cables Telegraphiques* (77 Fed., 495, 496) Judge Lacombe expressed the same opinion:

> It is thought that the main proposition advanced by complainant's counsel is a sound one, and that, without the consent of the General Government, no one, alien or native, has any right to establish a physical connection between the shores of this country and that of any foreign nation. Such consent may be implied as well as expressed, and whether it shall be granted or refused is a political question, which, in the absence of congressional action, would seem to fall within the province of the Executive to decide. As was intimated upon the argument, it is further thought that the Executive may effectually enforce its decision without the aid of the courts. * * *

In the case of *In re Debs* (158 U. S., 564, 582) it was said:

> The entire strength of the Nation may be used to enforce in any part of the land the full and free exercise of all national powers *and the security of all rights entrusted by the Constitution to its care.*

In that case the right involved was the right to have the post roads and the avenues of interstate commerce unobstructed by mob violence, and the

question was whether the Executive could invoke, and the courts exercise, the judicial power of injunction to protect this right. Not only was the power upheld, but the opinion also expressly concedes that the President might have resorted to military force to accomplish the same end. There was no statute purporting to authorize the President to employ armed force or to bring the suit. The authority to do these things was implied. From what? Not from any act of Congress, but from the necessity for safeguarding the national rights. An act of Congress might have been appropriate, but, in its absence, the executive and judicial powers were adequate.

The reasonableness and necessity of implying an authority in the Executive to deal with a subject within the legislative jurisdiction of Congress, but not covered by its enactments, were strikingly upheld in the celebrated case of *In re Neagle* (135 U. S., 1). The assignment of Neagle to guard the person and life of Justice Field was *without statutory authority.* He sued out his writ of *habeas corpus* upon the ground that he was being held in custody for an act done "in pursuance of a law of the United States" within the meaning of section 753 of the Revised Statutes. This court held that, in the absence of any act of Congress governing the subject, it was the duty of the President to afford suitable protection to the judges of the Federal courts while in the discharge of their duties;

that Justice Field was in the discharge of his duty as justice when the assault occurred, and that Neagle, by reason of his assignment by the Attorney General, was then and there under a duty to protect the justice, which might properly be regarded as a duty imposed upon him by "a law of the United States," as those words were used in the *habeas corpus* act. The opinion throughout is intensely interesting and instructive. We quote the following passages which strike us as particularly *apropos* to the present case. After remarking that the judicial department of the Government is impotent to protect itself, the court continued (p. 63):

> The legislative branch of the Government can only protect the judicial officers by the enactment of laws for that purpose, and the argument we are now combating assumes that no such law has been passed by Congress.
>
> If we turn to the executive department of the Government, we find a very different condition of affairs. The Constitution, section 3, Article II, declares that the President "shall take care that the laws be faithfully executed," and he is provided with the means of fulfilling this obligation by his authority to commission all the officers of the United States, and, by and with the advice and consent of the Senate, to appoint the most important of them and to fill vacancies. He is declared to be Commander in Chief of the Army and Navy of the United States. The

duties which are thus imposed upon him he is further enabled to perform by the recognition in the Constitution, and the creation by acts of Congress, of executive departments, which have varied in number from four or five to seven or eight, the heads of which are familiarly called Cabinet ministers. These aid him in the performance of the great duties of his office, and represent him in a thousand acts to which it can hardly be supposed his personal attention is called, and thus he is enabled to fulfill the duty of his great department, expressed in the phrase that "he shall take care that the laws be faithfully executed."

Is this duty limited to the enforcement of acts of Congress or of treaties of the United States according to their express terms, or does it include the rights, duties and obligations growing out of the Constitution itself, our international relations, and all the protection implied by the nature of the Government under the Constitution?

The court next refers to a noted case in which the President brought about the release of one Martin Koszta, a native of Hungary, who had declared his intention to become an American citizen and had been seized by the authorities of Austria; and after observing that the President's action met with the approval of the country and of Congress, inquires "upon what act of Congress then existing can anyone lay his finger in support of the action of our

Government in this matter?" It then proceeds (p. 65 *et seq.*):

> So, if the President or the Postmaster General is advised that the mails of the United States, possibly carrying treasure, are liable to be robbed and the mail carriers assaulted and murdered in any particular region of country, who can doubt the authority of the President or of one of the executive departments under him to make an order for the protection of the mail and of the persons and lives of its carriers, by doing exactly what was done in the case of Mr. Justice Field, namely, providing a sufficient guard, whether it be by soldiers of the Army or by marshals of the United States, with a *posse comitatus* properly armed and equipped, to secure the safe performance of the duty of carrying the mail wherever it may be intended to go?
>
> *The United States is the owner of millions of acres of valuable public land*, and has been the owner of much more which it has sold. Some of these lands owe a large part of their value to the forests which grow upon them. These forests are liable to depredations by people living in the neighborhood, known as timber thieves, who make a living by cutting and selling such timber, and who are trespassers. But until quite recently, even if there be one now, there was no statute authorizing any preventive measures for the protection of this valuable public property. Has the President no authority to place

guards upon the public territory to protect its timber? No authority to seize the timber when cut and found upon the ground? Has he no power to take any measures to protect this vast domain? Fortunately we find this question answered by this court in the case of *Wells* v. *Nickles* (104 U. S., 444). That was a case in which a class of men appointed by local land officers, under instructions from the Secretary of the Interior, having found a large quantity of this timber cut down from the forests of the United States and lying where it was cut, seized it. The question of the title to this property coming in controversy between Wells and Nickles, it became essential to inquire into the authority of these timber agents of the Government thus to seize the timber cut by trespassers on its lands. The court said: "The effort we have made to ascertain and fix the authority of these timber agents by any positive provision of law has been unsuccessful." But the court, *notwithstanding there was no special statute for it,* held that the Department of the Interior, acting under the idea of protecting from depredation timber on the lands of the Government, *had gradually come to assert the right* to seize what is cut and taken away from them wherever it can be traced, and in aid of this the registers and receivers of the Land Office had, by instructions from the Secretary of the Interior, been constituted agents of the United States for these purposes, with power to appoint special agents under themselves. *And the*

*court upheld the authority of the Secretary of the Interior to make these rules and regulations for the protection of the public lands.*

One of the cases in this court in which this question was presented in the most imposing form is that of *United States* v. *San Jacinto Tin Company* (125 U. S., 273, 279, 280). In that case, a suit was brought in the name of the United States, by order of the Attorney General, to set aside a patent which had been issued for a large body of valuable land, on the ground that it was obtained from the Government by fraud and deceit practiced upon its officers. A preliminary question was raised by counsel for defendant, which was earnestly insisted upon, as to the right of the Attorney General or any other officer of the Government to institute such a suit in the absence of any act of Congress authorizing it. *It was conceded that there was no express authority* given to the Attorney General to institute that particular suit, or any suit of that class. The question was one of very great interest, and was very ably argued both in the court below and in this court. The response of this court to that suggestion conceded that in the acts of Congress establishing the Department of Justice and defining the duties of the Attorney General there was no such express authority, and it was said that there was also no express authority to him to bring suits against debtors of the Government upon bonds, or to begin criminal prosecutions, or to institute criminal pro-

ceedings in any of the cases in which the United States was plaintiff, yet he was invested with the general superintendence of all such suits. It was further said: "If the United States, in any particular case, has a just cause for calling upon the judiciary of the country, in any of its courts, for relief by setting aside or annulling any of its contracts, its obligations, or its most solemn instruments, the question of the appeal to the judicial tribunals of the country must primarily be decided by the Attorney General of the United States. *That such a power should exist somewhere*, and that the United States should not be more helpless in relieving itself of frauds, impostures, and deceptions, than the private individual, is hardly open to argument. * * * There must, then, be an officer or officers of the Government to determine when the United States shall sue, to decide for what it shall sue, and to be responsible that such suits shall be brought in appropriate cases. The attorneys of the United States in every judicial district are officers of this character, and they are by statute under the immediate supervision and control of the Attorney General. How, then, can it be argued that if the United States has been deceived, entrapped, or defrauded into the making, under the forms of law, of an instrument which injuriously affects its rights of property, or other rights, it can not bring a suit to avoid the effect of such instrument, thus fraudulently obtained, without a

special act of Congress in each case, or without some special authority applicable to this class of cases?" The same question was raised in the earlier case of *United States* v. *Hughes* (11 How., 552), and decided the same way.

We can not doubt the power of the President to take measures for the protection of a judge of one of the courts of the United States, who, while in the discharge of the duties of his office, is threatened with a personal attack which may probably result in his death, and we think it clear that where this protection is to be afforded through the civil power, the Department of Justice is the proper one to set in motion the necessary means of protection.

As we understand the doctrine of the *Neagle case,* and the cases therein cited, it is clearly this: The Executive is authorized to exert *the power of the United States* when he finds this necessary for the protection of the agencies, the instrumentalities, or the property of the Government. This does not mean an authority to disregard the wishes of Congress on the subject, when that subject lies within its control and when those wishes have been expressed, and it certainly does not involve the slightest semblance of a power to legislate, much less to "suspend" legislation already passed by Congress. It involves the performance of specific acts, not of a legislative but purely of an executive character—acts which are not in themselves laws, but which

presuppose a " law " authorizing him to perform them. This law is not expressed, either in the Constitution or in the enactments of Congress, but reason and necessity compel that it be implied from the exigencies of the situation.

In none of the cases which we have mentioned, nor in the cases cited in the extracts taken from the *Neagle case,* was it possible to say that the action of the President was directed, expressly or impliedly, by Congress. The situations dealt with had never been covered by any act of Congress, and there was no ground whatever for a contention that the possibility of their occurrence had ever been specifically considered by the legislative mind. In none of those cases did the action of the President amount merely to the execution of some specific law.

Neither does any of them stand apart in principle from the case at bar, as involving the exercise of specific constitutional powers of the President in a degree in which this case does not involve them. Taken collectively, the provisions of the Constitution which designate the President as the official who must represent us in foreign relations, in commanding the Army and Navy, in keeping Congress informed of the state of the Union, in insuring the faithful execution of the laws and in recommending new ones, considered in connection with the sweeping declaration that the executive power shall be vested in him, completely demon-

strate that his is the watchful eye, the active hand, the overseeing dynamic force of the United States. (See 1 Watson on the Constitution, 854.)

> Energy in the executive is a leading character in the definition of good government. * * * A feeble executive implies a feeble execution of the government. A feeble execution is but another phrase for a bad execution; and a government ill executed, whatever it may be in theory, must be in practice a bad government. The Federalist, No. 70 (69), by Hamilton.

The very fact that the President, with the whole military and civil establishments of the Government at his command, has *the ability to act,* points directly to him as the appropriate agent of the Government when immediate action, executive in quality, is demanded in the public interest. But of what avail are this potency and this adaptability if they must await a command which can never be given? It is his duty to call the attention of Congress to serious and dangerous situations which may be fittingly met by legislation, and recommend the measures which he thinks should be enacted. But when a situation exists so pressing and so critical that the performance of these duties would be a barren form, must he stand by and do nothing while the public interests are being sacrificed or frittered away beyond recall? Not if this can be prevented by any act, *executive in quality,* which does not involve the making or infraction of a law, or the ex-

ercise of any other governmental power which, being vested generally in another department, is, by its very nature, or by the express terms of the Constitution, prohibited to him. As the Commander in Chief of the Navy, and in many ways the guardian of the national efficiency in warfare on the sea, the President was under a peculiar duty to consider the relation of these petroleum lands to the development of our naval strength and to our common defense in the future; and having found the lands of the greatest importance, it was clearly his duty to reserve them, at least until Congress could act upon the matter. This is all that he did. To have abstained or to have delayed the reservation longer would have been a neglect of his duty to execute the laws, in that generic and necessary sense which was recognized in the authorities which are cited above.

6. *An executive reservation implies no invasion of the province of Congress.*

The Constitution vests in Congress the power "to dispose of and make all needful rules and regulations respecting" the lands and other property of the United States. The question is whether an act of the President, purely protective in purpose and result, conflicts with this constitutional grant of power. In order to gain a perfect understanding of what is here involved let it first be observed that the President does not undertake to *dispose* of this property; on the contrary, he preserves it from disposition until Congress can ex-

press its will concerning it. Let it be understood, also, that he does not undertake to make any *regulation* or rule. Again, all that he does is subject to be undone by Congress, and Congress has merely to express its will in order to restore the situation to precisely what it was before the President acted. Lastly, in order that the question may be considered in all its simplicity, let it be assumed that, at the time when the President acts, there is no statute in existence which can be said to evince any intention of Congress either to forbid or to allow him to make such a reservation. We will, of course, assume, too, in accordance with the facts in the case at bar, that the preservation of the lands reserved is of very great importance to the public weal, and that, if the President can not act, no action can be taken in time to be effective—facts which render it highly probable, if not certain, that if the President does act, his action will receive the subsequent approbation of Congress (just as it was given in the present case).

The answer seems to depend upon whether one attributes to the constitutional provision a sensible meaning or one of a preposterous technicality. Did the Constitution mean to lock up the power over public property so exclusively in Congress that the Executive head of the Nation could not touch it, use it, or deal with it in any way, even for its protection, unless he could point to some statutory authorization? Are there no rights

in its property and no purposes concerning it which may be presumed to be the rights and purposes of the Government, when Congress has neglected to legislate? Must the President, beholding the public lands devastated by fire, or invaded and despoiled by trespassers, stand motionless and helpless because Congress has neglected to say how, in its desire, such situations should be treated?

It is plain that this limited authority is one which would naturally be supposed to exist; that it can work no harm whatever; that it may do incalculable good. It is altogether reasonable that it should exist. A scheme of government which neglected to provide for the contingencies which in our Government can only be met by this implied power of action would be so far defective and unreasonable. What, then, are the reasons which are alleged against the existence of this authority? None, but the bare proposition that the control over the public lands is vested exclusively in Congress. We concede that the control of Congress is potentially exclusive; but we deny that the Constitution itself excludes the President from performing acts which do not interfere with that control. There are no arbitrary dogmas of constitutional construction; reason dominates every rule that has ever been applied. There is no principle that the mere grant of a power not linked with any prohibition, *ipso facto,* prevents all exercise of authority over the same subject by other governmental agencies. The

question whether and to what extent the grant implies such a prohibition is to be determined by the nature of the power granted and of the acts said to be in conflict with it.

Thus the pardoning power is vested by the Constitution in the President, and yet it is established (partly by an early practical construction and partly upon the ground of noninterference) that this power may be exercised, in some respects at least, by the Secretary of the Treasury, acting pursuant to an act of Congress (*The Laura*, 114 U. S., 411, 415) and by Congress itself (*Brown* v. *Walker*, 161 U. S., 591, 601). This involves no interference with the President's power, because he remains at liberty to exercise it whenever he sees fit to do so.

A much closer analogy is found in the power of Congress over interstate commerce. This is potentially exclusive. Congress, by affirmatively occupying the entire field, can take away from the States any power they otherwise might have to touch the subject of interstate commerce. But nothing is better understood than that, in default of such exclusive occupation by Congress, there is liberty in the States to act, if their acts do not amount to a direct interference with interstate commerce on the one hand or clash with some regulation of Congress on the other. All that the express grant impliedly forbids of its own force is the direct interference.

The same principle is applicable in determining the respective powers of two branches of the Federal Government. The fact that a subject is committed generally to Congress should not be taken as *ipso facto* forbidding what would otherwise be a reasonable implication of authority in the Executive to deal with the subject in particular phases. Congress not having acted at all, the prohibition should be made to depend upon whether the executive action in question would amount to a direct interference with the congressional power of control. If it would not—and most assuredly it would not in the present case—the implication should be allowed, until excluded by some act of Congress.

It hardly need be added that the act of setting apart specific lands for a public reservation has no legislative quality. The authority to do this may be, and has been, delegated in the broadest terms, as by the statutes expressly authorizing the President to make and unmake forest reservations (act of March 3, 1891, 26 Stat., 1095, 1103; act of June 4, 1897, 30 Stat., 34), by the act of June 25, 1910, *supra*, respecting temporary withdrawals like the one in controversy, and by other statutes too numerous to mention. Congress may authorize the Executive not only to make reservations, but also to make regulations to insure their protection and govern their use, and it may even provide that a violation of the regulations shall constitute a criminal

offense. (*United States* v. *Grimaud*, 220 U. S., 506; *Light* v. *United States*, *id.*, 523.)

Even the rules which Congress adopts for the disposition of the public domain are not in the proper sense legislation.

> *Butte City Water Co.* v. *Baker*, 196 U. S., 119, 125–126.

7. *The executive practice, acquiesced in by Congress and upheld by the courts, affords a practical construction of the President's authority under the Constitution.*

In *The Laura* (114 U. S., 411), the court was called upon to decide whether an act of Congress empowering the Secretary of the Treasury to remit certain fines and penalties was an encroachment upon the pardoning power of the President. It said (p. 416):

> Touching the objection now raised as to the constitutionality of the legislation in question, it is sufficient to say, as was said in an early case, that the practice and acquiescence under it, "commencing with the organization of the judicial system, affords an irresistible answer, and has indeed fixed the construction. It is a contemporary interpretation of the most forcible nature. This practical exposition is too strong and obstinate to be shaken or controlled. Of course, the question is at rest, and ought not now to be disturbed." (*Stuart* v. *Laird*, 1 Cranch, 299, 308.)

## III.

**The mining law is in no way inconsistent with the implied power of reservation.**

As has already been sufficiently pointed out, the mining law can have no possible bearing upon the question of the President's authority, unless it be upon the theory that the authority, independently existing, was intended to be superseded by the law. To test this theory one must assume that the President had the authority to reserve mineral land for public purposes when the act was passed, and then inquire whether there is anything in the language of the act, or in the purposes which it was framed to accomplish, indicative of a legislative intention to take that authority away. That the act touches only the vacant, unappropriated public domain will hardly be contested. Indeed, it shows upon its face (R. S., 2322) that it was only to mineral deposits "on the public domain" (i. e., the "public lands," *Barker* v. *Harvey,* 181 U. S., 481, 490) that it was intended to apply. Subsequent statutes, and the peculiar conditions in California which gave rise to the mining legislation of 1866, as well as the history and administration of that legislation as a whole, might be invoked, if it were necessary, to show that the law never could have been intended to lay open the public reservations which had already been established to the intrusions of prospectors and to private acquisition. But it is useless to

pursue that point with elaboration; as to existing reservations, the proper construction of the law is plain.

> Whensoever a tract of land shall have been once legally appropriated to any purpose, from that moment, the land thus appropriated becomes severed from the mass of public lands; and that no subsequent law, or proclamation, or sale, would be construed to embrace it, or to operate upon it; although no reservation were made of it.
>
> *Wilcox* v. *Jackson*, 13 Pet., 496, 513.
>
> Many authorities might be cited to the proposition that a prior appropriation is always understood to except lands from the scope of a subsequent grant, although no reference is made in the latter to the former.
>
> *Scott* v. *Carew*, 196 U. S., 100, 111. See, also,
>
> *Leavenworth, &c., R. Co.* v. *United States*, 92 U. S., 733, 745.
>
> The words "public land" have long had a settled meaning in the legislation of Congress, and when a different intention is not clearly expressed, are used to designate such land as is subject to sale or other disposal under general laws, but not such as is reserved by competent authority for any purpose or in any manner, although no exception of it is made.
>
> *Northern Lumber Co.* v. *O'Brien* (C. C. A., 8th Circuit), 139 Fed., 614, 616.

*McFadden* v. *Mountain View Min. & Mill. Co.* (C. C. A., 9th Circuit, 97 Fed., 670, 680), besides

deciding expressly that the effect of an Executive order Indian reservation "was to exclude all intrusions upon the territory thus reserved * * * for mining as well as other purposes," involved also the construction of a statute providing that, after making certain allotments, a portion of the reservation should be opened by proclamation to settlement and entry, and "disposed of under the general laws applicable to the disposition of public lands." Of this the court said:

> The general laws applicable to the disposision of the public lands embrace those relating to mining claims as well as those relating to preemption, homestead, and other entries. * * * (Citing *Newhall* v. *Sanger*, 92 U. S., 763.) While it is true that the right to mineral lands is initiated by location after the proper discovery of mineral thereon, and that such claims may be held and worked without purchase, yet the law authorizing their exploration also provides for their location, entry, and purchase. (Rev. Stat., secs. 2319–2350.) It necessarily follows that any of the lands of the United States that are by its general laws open to exploration for minerals are likewise open to location, entry, and purchase as such, if they be mineral in character and mineral be discovered therein. Hence it can not be true, we think, that the portion of the Colville Reservation restored to the public domain by the act of July 1, 1892, was any more open to the public in the exploration of minerals and

> the location of mining claims thereon, in advance of the proclamation of the President therein provided for, than it was to any other kind of entry or settlement or disposition.

If it be clear that a general land law like the mining law may not be construed as authorizing interference with existing public reservations, it is equally clear that it may not be construed to interfere with an existing power to make public reservations. The same considerations of public convenience and necessity which support the one support the other. Both constitute provisions or instrumentalities of government. Therefore they are not to be deemed within the purview of a general law granting privileges to individuals which makes no mention of them.

> If rights claimed under the Government be set up against it, they must be so clearly defined that there can be no question of the purpose of Congress to confer them.
>
> *Leavenworth, &c., R. Co.* v. *United States,* 92 U. S., 733, 740.

But there is no real occasion for applying this rule of construction. There is not even an apparent conflict between the mining law and the authority to make reservations. Both relate to the public lands, yet each remains but a mere potentiality in respect of them until something is done affirmatively to connect it with some specific tract or tracts. When that is done the specific lands are segre-

gated—they are no longer "public lands"—the general subject matter to which both the law and the reserving authority were potentially applicable has been reduced in quantity by so much, but in the process there has been no interference by one right or authority with another. The coexistence of numerous laws applicable to the same character of lands is a familiar feature of the public-land legislation. Thus the homestead law, the preemption law (now repealed), the desert-land law, laws giving to States and railroad companies the right of lieu selection, various laws concerning scrip, etc., might all be applicable to one and the same tract of land. No one would pretend to believe that as these laws were enacted each operated in turn to restrict the scope of the one that preceded it.

In *Behrends* v. *Goldsteen* (1 Alaska, 518, 524), which concerned the validity of a withdrawal of lands by the Secretary of the Navy, the court, on pages 524 and 525 of the opinion, said:

> It has been so frequently decided that no mineral location can be lawfully made upon lands reserved from sale by the Government, that it is deemed inadvisable and unnecessary to discuss that question.

In *Gibson* v. *Anderson, supra* (131 Fed., 39, 41), the Circuit Court of Appeals said:

> But there is no question here of repealing or suspending the operation of an act of Congress. The question is whether the

> President could, by proclamation, reserve a portion of the unoccupied public lands of the United States for an Indian reservation.

And further, in the same opinion:

> Congress did not thereby (by the mining act) dispose of any estate in the public lands, or create any burden thereon, or establish any right therein until the actual inception and assertion of mining rights thereunder. Statutory license to locate mining claims has never been held, prior to the acquisition of a vested right, to be an obstacle to either the disposition or the reservation of the public lands.

The right to enter under this law, as under any other general law—

> is not a vested one in any particular land. It is an offer by the Government of a privilege, not a contract. (*Yosemite Valley case*, 15 Wall., 77.) The right or privilege to purchase extends only to lands subject to sale and not to those appropriated. (*Spaulding* v. *Chandler*, 160 U. S., 394; *Wilcox* v. *Jackson*, 13 Pet., 498.)
>
> *Longnecker's case* (30 L. D., 611) (opinion approved by Assistant Attorney General Van Devanter).

See also Attorney General MacVeagh's opinion of October 21, 1881 (17 Op., 230).

The President's authority to reserve land for public purposes derives its very existence from the fact that without it the national interests would be jeopardized. That Congress would deliberately de-

stroy such authority, without supplying anything to take its place, is literally beyond belief. That Congress could be held to have done so, in the absence of a clear, direct, and specific expression of the intention, is legally impossible. And yet, thus far, the very bedrock of the defense in this case has been the proposition that such an intention was manifested in a general law, permitting individuals to occupy and acquire such portions of the public domain as are found to be unappropriated when they see fit to take advantage of the privilege. In other words, the court is requested to hold that this law, merely because, like every similar law, it describes and applies to a general subject matter, must be regarded as evidence, not merely of a legislative purpose to bring the subject matter within the possibility of private acquisition, but also as evidence of a clear, unequivocal legislative policy to remove the subject matter entirely from devotion to public use, however great the emergency and pressing the need. This view is plainly impossible.

### CONCLUSION.

The reservation has been criticised because it was large, an argument which assumes that the national interests in small things may be protected, but denies them protection in great emergencies. The fact that Congress, in effect, approved the reservation, ought to suffice to settle this objection.

The only objection which can be made to the order of June 12, 1856, which was after

> the passage of the act, is that the commissioner withdrew too much land, to wit, all land in the district, but that was a matter for the determination of the Land Department, and can not be revised or disregarded by the courts. *Spencer* v. *McDougal,* 159 U. S., 62, 64.

As usual in such cases, the authority claimed is sought to be borne down by piling up imaginary examples of extreme abuse. But our inquiry concerns not what might be done, but what actually was done in the case before the court. The possibility of abuse goes with every important authority, but it is well understood that this possibility must be accepted and passed by, in the task of sound construction.

> Hypothetical cases of great evils may be suggested by a particularly fruitful imagination in regard to almost every law upon which depend the rights of the individual or of the Government, and if the existence of laws is to depend upon their capacity to withstand such criticism, the whole fabric of the law must fail. *United States* v. *Lee,* 106 U. S., 196, 217.

This is particularly true in the present case, because the authority claimed, and the acts performed under it, are subject to the superior power of Congress.

> But it has often been said that the fact that the exercise of power may be abused is no sufficient reason for denying its exist-

ence, and if restrictions are to be placed upon the exercise of this power by the Attorney General, it is for the legislative body which created the office to enact them. *United States* v. *San Jacinto Tin Co.*, 125 U. S., p. 284.

The fact that Congress approved the President's action affords a complete answer to the charge that his authority was abused.

It is respectfully submitted that the decree of the District Court should be reversed.

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DECEMBER, 1913.